Department of Environmental Conservation

**Division of Environmental Remediation**

# *DRAFT*

# 6 NYCRR PART 375

## Environmental Remediation Program

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New York State Department of Environmental Conservation
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# Subpart 375-1
# General Remedial Program Requirements

Part 375-1 deleted new language follows

**375-1.1 Purpose; applicability; construction; abbreviations; severability.**

(a) The purpose of this Part is to provide for the orderly and efficient administration of ECL article 27 titles 13 and 14, ECL article 52 title 3, article 56 title 5, article 71 title 36, and SFL 97-b.

(b) This Part applies to the following:

(1) The development and implementation of remedial programs for inactive hazardous waste disposal sites, specifically under subpart 375-2, including but not limited to sites listed in the Registry which are either on the National Priorities List or are being addressed by the Department of Defense or the Department of Energy.

(2) The development and implementation of remedial programs for brownfield sites, specifically under subpart 375-3.

(3) The development and implementation of remedial programs for environmental restoration projects, specifically under subpart 375-4.

(c) This Part is intended to promote the public good consistent with the policy of this State set out at ECL 1-0101 and accordingly this Part shall be construed so as to achieve that objective. As used herein, the singular includes the plural. Any reference herein to a particular provision of any State statute or regulation shall be deemed a reference to such provision as it may hereafter be amended or redesignated.

(d) This subpart sets forth the general requirements that are common to the implementation of remedial programs under subparts 375-2, 375-3 and 375-4. Specific requirements which apply in addition to these general requirements are set forth in subparts 375-2, 375-3 and 375-4. If there is a conflict, this subpart is superceded by any inconsistent provision of subparts 375-2, 375-3 and 375-4.

(e) Abbreviations:

(1) Statutes:

(i) "CPLR" means the Civil Practice Law and Rules;

(ii) "ECL" means the Environmental Conservation Law;

(iii) "EL" means the Executive Law;

(iv) "GOL" means the General Obligations Law;

(v) "NL" means the Navigation Law;

(vi) "NPCL" means the Not-for-Profit Corporation Law;

(vii) "PHL" means the Public Health Law;

(viii) "RPL" means the Real Property Law;

(ix) "SFL" means the State Finance Law;

(x) "USC" or "USCA" means United States Code.

(2) Regulations:

(i) "6 NYCRR" means title 6 of the Official Compilation of Codes, Rules and Regulations;

(ii) "10 NYCRR" means title 10 of the Official Compilation of Codes, Rules and Regulations;

(iii) "19 NYCRR" means title 19 of the Official Compilation of Codes, Rules and Regulations.

(f) If any provision of this Part or its application to any particular person or circumstance is held invalid, the remainder of this Part and its application to other persons and circumstances shall not be affected thereby.

(g) The following documents have been incorporated by reference and filed with the Department of State. The documents are also available for inspection and copying at the Department's offices at 625 Broadway, Albany, New York, 12233-7010:

(1) Standards 1527-00 and 1527-97, published by ASTM International, Post Office Box C700,

West Conshohocken, Pennsylvania, 19428-2959; and

(2) The National Contingency Plan (NCP), which document is available from the United States Environmental Protection Agency (EPA) on its website at http://www.epa.gov.

**375-1.2 Definitions.**

The definitions set forth at ECL 27-1301, 27-1405, 56-0502, some of which are clarified in this section, and the additional definitions set forth in this section, shall apply to these regulations. Certain definitions which apply only to the programs are set forth in subparts 375-2, 375-3 and 375-4 of this Title respectively.

(a) "All appropriate inquiry" means, for purposes of ECL 27-1323.4(c), compliance with the procedures of ASTM Standard 1527-00, except that for acquisitions completed prior to January 1, 2001, compliance with the procedures of Standard 1527-97 shall be deemed sufficient.

(b) "Brownfield site" means any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant. Such term shall not include real property identified in subdivision 375-3.3(b).

(c) "Brownfield site remedial program" means a remedial program, as defined at subsection 375-1.2(ao), at a brownfield site.

(d) "Certificate holder" means the remedial party set forth in the certificate of completion issued by the Department, as well as such party's successors and assigns who have received a transfer of such certificate in accordance with subdivision 375-1.9(f).

(e) "Commissioner" means the Commissioner of Environmental Conservation or such individual's designee.

(f) "Concentrated solid or semi-solid hazardous wastes" means solid or semi-solid hazardous wastes present in surface or subsurface soil, surface water, sediment or groundwater in a concentrated form, such as precipitated metallic salts, metal oxides, or chemical sludges.

(g) "Contaminant" means hazardous waste and/or petroleum as such terms are defined in this Part.

(h) "Contaminated" or "contamination" means the presence of a contaminant in any environmental media, including soil, surface water, groundwater, soil vapor, air or indoor air.

(i) "Days" means calendar days.

(j) "Dense non-aqueous phase liquid" or "DNAPL" means a contaminant that is a liquid that is denser than water and does not dissolve.

(k) "Department" means the Department of Environmental Conservation.

(l) "Disposal" means the abandonment, discharge, deposit, injection, dumping, spilling, leaking or placing of any contaminant so that such contaminant or any related constituent thereof may enter the environment. Disposal also means the thermal destruction of a contaminant and the burning of a contaminant as fuel for the purpose of recovering usable energy.

(m) "Document repository" means a repository of site remedial program documents established in a publicly accessible building near the location of such site.

(n) "Ecological resources" means all flora and fauna and the habitats that support them, excluding such species as pets, livestock, agricultural and horticultural crops.

(o) "Emergency" means any event or condition, whether natural or human-made, which presents an imminent threat to life, health, property, or natural resources due to a release or threaten release of a contaminant.

(p) "Engineering control" means any physical barrier or method employed to actively or passively contain, stabilize, or monitor contamination, restrict the movement of contamination to ensure the long-term effectiveness of a remedial program, or eliminate potential exposure pathways to contamination. Engineering controls include, but are not limited to, pavement, caps, covers, subsurface barriers, vapor barriers, slurry walls,

building ventilation systems, fences, access controls, provision of alternative water supplies via connection to an existing public water supply, adding treatment technologies to such water supplies, and installing filtration devices on private water supplies.

(q) "Environment" means any water including surface or groundwater, sediment, water vapor, any land including land surface or subsurface, air including soil vapor, fish, wildlife, other biota, all other natural resources and humans.

(r) “Environmental damage” means any injury to the environment, any impairment of its use by flora or fauna and any adverse public health impact.

(s) “Environmental easement” means an interest in real property, created under and subject to the provisions of ECL Article 71 Title 36 which contains a use restriction and/or a prohibition on the use of land in a manner inconsistent with engineering controls; provided that no such easement shall be acquired or held by the state which is subject to the provisions of article fourteen of the constitution.

(t) “Environmental restoration project” means a project to investigate or to remediate contamination pursuant to ECL article 56 title 5.

(u) “Feasible” means suitable to site conditions, capable of being successfully carried out with available technology, implementable and cost effective.

(v) “Financial assurance” means financial mechanisms, which include but are not limited to surety bonds, trust funds, letters of credit, insurance or a multiple of financial mechanisms, as determined to be adequate by the Department, to ensure the long term implementation, maintenance, monitoring and enforcement of the engineering and institutional controls at a remedial site.

(w) “Grossly contaminated media” means soil, sediment, surface water or groundwater which contains free product or mobile contamination that is identifiable either visually, through strong odor, by elevated contaminant vapor levels or is otherwise readily detectable without laboratory analysis.

(x) “Groundwater” means water below the land surface in a saturated zone of soil or rock. This includes perched water separated from the main body of groundwater by an unsaturated zone.

(y) “Hazardous waste” means a waste which appears on the list or satisfies the characteristics promulgated by the commissioner pursuant to ECL 27-0903 and any substance which appears on the list promulgated pursuant to ECL 37-0103; provided, however, that the term "hazardous waste" does not include:

(1) Natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel, or mixtures of natural gas and such synthetic gas; nor

(2) The residue of emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; nor

(3) Source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the atomic energy act of 1954, if such release is subject to requirements with respect to financial protection established under section 170 of such act (42 U.S.C. 2210) or, for the purpose of section 104 of the comprehensive environmental response, compensation and liability act of 1980 (42 U.S.C. 9604), or any other response action, any source, byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7912(a)(1) or 7942(a)); nor

(4) Petroleum as defined in section one hundred seventy-two of the navigation law, even if appearing on the list promulgated pursuant to section 37-0103 of this chapter.

(z) "Historic fill material" means non-indigenous material, deposited or disposed of to raise the topographic elevation of the site or area encompassing the site, which was contaminated prior to emplacement, and is in no way connected with the subsequent operations at the location of the emplacement and which includes, without limitation, construction debris, dredge spoils, incinerator residue, demolition debris, fly ash and

non-hazardous solid waste. Historic fill material does not include any material which is chemical production waste or waste produced on the site from processing of metal or mineral ores, residues, slag or tailings. In addition, historic fill material does not include waste at or from a municipal solid waste disposal site.

(aa) "Inactive hazardous waste disposal site" means any area or structure used for the long term storage or final placement of hazardous waste including, but not limited to, dumps, landfills, lagoons and artificial treatment ponds, as to which area or structure no permit or authorization issued by the department or a federal agency for the disposal of hazardous waste was in effect after the effective date of this title and any inactive area or structure on the National Priorities List established under the authority of 42 U.S.C.A. Section 9605.

(ab) "Inactive hazardous waste disposal site remedial program" means a remedial program, as defined at subdivision 375-1.2(an), at an inactive hazardous waste disposal site.

(ac) "Institutional control" means any non-physical means of enforcing a restriction on the use of real property that limits human or environmental exposure, restricts the use of groundwater, provides notice to potential owners, operators, or members of the public, or prevents actions that would interfere with the effectiveness of a remedial program or with the effectiveness and/or integrity of operation, maintenance, or monitoring activities at or pertaining to a remedial site.

(ad) "Interim remedial measure" means activities to address both emergency and non-emergency site conditions, which can be undertaken without extensive investigation and evaluation, to prevent, mitigate or remedy environmental damage or the consequences of environmental damage attributable to a site, including but not limited to, the following activities: construction of diversion ditches; collection systems; drum removal; leachate collection systems; construction of fences or other barriers; installation of water filters; provision of alternative water systems; the removal of free product; or plume control.

(ae) "Off-site contamination" means any contamination which has emanated from a remedial site beyond the real property boundaries of such site, via movement through air, indoor air, soil, surface water or groundwater.

(af) "On-site contamination" means any contamination located within the real property boundaries of a remedial site.

(ag) "Operable unit" means a portion of the remedial program for a site that for technical or administrative reasons can be addressed separately to investigate, eliminate or mitigate a release, threat of release or exposure pathway resulting from the site contamination. The cleanup of a site can be divided into operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, media specific action, specific site problems, or an initial phase of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

(ah) "Person" means an individual or legal entity, including but not limited to: a trust; a firm; an estate; a joint stock company; a limited liability company; any corporation; a joint venture; a partnership; an association; a state; a municipality or any other political subdivision of a state; any commission, agency, Department or bureau of a state or any interstate body.

(ai) "Petroleum" means oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene.

(aj) "Presumptive remedy" means technologies or approaches appropriate for the remediation of specific types of contamination which, based on historical patterns of remedy selection and the Department's scientific and engineering evaluation of performance data, can be used to accelerate the remedy selection process.

(ak) "Professional engineer" means an individual or firm licensed or otherwise authorized under article 145 of the Education Law of the State of New York to practice engineering.

(al) "Registry" means the registry of inactive hazardous waste disposal sites maintained by the Department, pursuant to ECL 27-1305.

(am) "Remedial investigation" means a process undertaken to determine the nature and extent of

contamination at a site or operable unit of a site. The remedial investigation emphasizes data collection and site characterization, and generally is performed concurrently with the feasibility study and is more fully described in Part 375-1.8. It includes, but is not limited to, the sampling and analysis necessary to gather sufficient information to evaluate human exposure pathways and environmental impacts and to determine the necessity for and the proposed extent of remediation, in order to support the development and evaluation of proposed alternatives in the remedy selection process.

(an) "Remedial party" means a person implementing a remedial program at a remedial site pursuant to an order, agreement or State assistance contract with the Department.

(ao) "Remedial program" means all activities undertaken to investigate, design, eliminate, remove, abate, control, or monitor existing health hazards, existing environmental hazards, potential health hazards, and/or potential environmental hazards in connection with a site, and all activities undertaken to manage wastes and contaminated materials from a site including, but not limited to the following:

(1) Site characterization and remedial investigation activities needed to develop and evaluate remedial alternatives;

(2) Interim remedial measures;

(3) Design activities;

(4) Remedial actions, includes construction related activities and the implementation of remedial treatment technologies, including without limitation grading, contouring, trenching, grouting, capping, excavation, transporting, incineration and other thermal treatment, chemical treatment, biological treatment, or construction of groundwater and/or leachate collection and treatment facilities;

(5) Post-remedial site management, including but not limited to, the operation, maintenance, monitoring of remedial treatment technologies, and the certification of institutional and engineering controls;

(6) Restoration of the environment (not including natural resource damages);

(7) Appropriate involvement by local governments and by the public; and

(8) Oversight by the Department.

(ap) "Remedial site" or "site" means any real property constituting:

(1) An inactive hazardous waste disposal site;

(2) A brownfield site; or

(3) An environmental restoration project, as defined by the State assistance contract.

(aq) "Sediment" means unconsolidated particulate material found at the bottom of lakes, rivers, streams and other water bodies at bed elevations equal to or lower than the mean high water level as defined in subdivision 608.1(i) of this Title.

(ar) "Site contact list" or "brownfield site contact list" means a list of persons, government agencies, groups, or organizations, including, but not limited to the chief executive officer and zoning board of each county, city, town and village in which such site is located, the public water supplier which serves the area in which such site is located, any site residents, any person who has requested to be placed on the site contact list, and the administrator of any school or day care facility located on the site for the purposes of posting and/or dissemination at the facility. Provided, however, that where the site or adjacent real property contains multiple dwelling units, the remedial party may propose an alternative method, consistent with section 375-1.10, for providing such notice in lieu of mailing to each individual.

(as) "Site management" means the activities undertaken as the last phase of the remedial program at a site, in accordance with a site management plan, which continue until the remedial action objectives for the project are met and the site can be closed out. Site management includes the management of the institutional and engineering controls required for a site, as well as the implementation of any necessary monitoring and/or operation and maintenance of the remedy.

(at) "Source area" or "source" means a portion of a site or area of concern at a site where the investigation has identified contaminated medium which have the potential for contaminants to migrate in that medium, or to release significant levels of contaminants to another environmental media, which could result in a threat to public health and the environment. A source area typically includes, but is not limited to, soil, sediment and/or groundwater where any of the following are present:

(1) Free product;

(2) Concentrated solid or semi-solid hazardous substances;

(3) Dense non-aqueous phase liquids (DNAPL) or light non-aqueous phase liquids (LNAPL); or

(4) Grossly contaminated media.

(au) "Technical Assistance Grant" means a grant provided in accordance with ECL 27-1316 and ECL 27-1417.4.

(av) "Water supplier" or "public water supplier" means any public water system which provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least five service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year.

**375-1.3 Reserved**

**375-1.4 Reserved**

**375-1.5 Orders/Agreements/State assistance contracts**

(a) Notice of order, agreement or State assistance contract. The remedial party shall provide written notice of any order, agreement or State assistance contract, and the status of the remedial program to any prospective purchaser or lessee of any interest in the remedial site.

(b) In addition to such further terms and conditions as the Department may require in the order, agreement or State assistance contract, the following provisions apply when a remedial party is implementing a remedial program under an order, agreement or State assistance contract with the Department. The order, agreement or State assistance contract shall be binding on each party, its successors and assignees while in effect. No change in the ownership or corporate or business status of any party, or of the site shall alter any signatory's responsibilities under this order, agreement or State assistance contract.

(1) Emergencies. The remedial party shall notify the Department's project manager by noon of the next business day, upon knowledge of any condition posing an immediate threat to public health or the environment. In the event that any action or occurrence under the order, agreement or State assistance contract causes or threatens an emergency situation or presents an imminent threat to public health or the environment, the remedial party shall promptly take all appropriate action to prevent, abate, or minimize such emergency or imminent threat in accordance with applicable law. Nothing in this paragraph shall be deemed to limit the authority of the Department to take, direct, or order all appropriate action to protect public health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release from the site.

(2) Dispute Resolution.

(i) The remedial party agrees to the following steps, or as many as are necessary to resolve disputes between the Department and the remedial party. The remedial party specifically agrees to submit, in the first instance, any dispute relating to the order, agreement or State assistance contract to the designated individual, who shall render a written decision and furnish a copy thereof to the remedial party.

*(a)* the remedial party must request such decision in writing no more than fifteen days after it knew or should have known of the facts which are the basis of the dispute.

*(b)* the decision of the designated individual shall be the final agency determination, unless the remedial party files a written appeal of that decision with the designated appeal individual within twenty days of receipt of that decision.

(ii) Upon receipt of the written appeal, the designated appeal individual, will review the record and decision. The designated appeal individual will take one of the following actions, with written notice to the remedial party:

*(a)* remand the matter to the program staff for further negotiation or information if it is determined that the matter is not ripe for review;

*(b)* determine that there is no need for further action, and that the determination of the designated individual is confirmed; or

*(c)* Make a determination on the record as it exists.

(iii) The decision of the Designated appeal individual shall be the final agency decision. The designated individual to:

*(a)* hear disputes is a remedial bureau director in the Division of Environmental Remediation; and

*(b)* to review dispute decisions is the assistant director of the Division of Environmental Remediation

(vi) The invocation of dispute resolution shall not extend, postpone, or modify obligations with respect to any item not in dispute unless or until either:

*(a)* the Department agrees in writing to an extension, postponement or modification; or

*(b)* a Court determines otherwise.

(v) The Department shall keep an administrative record of dispute resolution proceedings.

(3) Payment of State Costs.

(i) Within 45 days after receipt of an itemized invoice from the Department, the remedial party shall pay to the Department a sum of money which shall represent reimbursement for state costs, which shall include costs associated with negotiating the order, agreement or State assistance contract, and all costs associated with the order or agreement up to and including the date upon which the certificate of completion is issued, the Department approves the final site management report, or the order or agreement is terminated, whichever is later. If the remedial party is also responsible for reimbursement of past State costs, associated with remedial activities conducted at the site such reimbursement must also be made within 45 days after the receipt of an itemized invoice from the Department.

(ii) The invoice shall be calculated and documented as follows:

*(a)* personal service costs shall be documented by reports of direct personal service;

*(b)* approved agency fringe benefit and indirect cost rates shall be applied;

*(c)* non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports; and

*(d)* except as otherwise provided by statute or regulation, the Department is not obligated to provide any other documentation of costs.

(iii) Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environmental Remediation

NYSDEC
625 Broadway, Albany, NY 12233-7012

(iv) The remedial party shall provide written notification within 90 days of any change in its address.

(v) A remedial party may contest, in writing, invoiced costs if it believes

*(a)* the cost documentation contains clerical, mathematical, or accounting errors;

*(b)* the costs are not related to the State's activities at the site; or

*(c)* the State is not otherwise entitled to such costs.

(vi) If a remedial party objects to an invoiced cost, such party shall pay all costs not objected to within the 45 day time frame and shall, within 30 days of receipt of an invoice, identify in writing all costs objected to and identify the basis of the objection. This objection shall be filed with the DER Director who shall have the authority to waive the obligation to pay disputed costs. Within 45 days of the Department's determination of the objection, the remedial party shall pay to the Department the amount which the DER Director determines is owed to the State.

(4) Force Majeure.

(i) No remedial party shall suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of an order, agreement or State assistance contract to implement all or part of a remedial program if the failure to comply is the result of a force majeure event. A force majeure event shall include acts of God, work stoppages due to labor disputes or strikes, fires, explosions, epidemics, riots, war rebellion, sabotage or the like. If a failure of or delay in performance by the remedial party results from the occurrence of a Force Majeure event, the delay shall be excused and the time for performance extended by a period equivalent to the time lost because of the Force majeure event, if and to the extent that the:

*(a)* delay or failure was beyond the control of the remedial party affected and not due to its fault or negligence;

*(b)* delay or failure was not extended because of the remedial party 's failure to use all reasonable diligence to overcome the obstacle or to resume performance immediately after such obstacle was overcome;

*(c)* remedial party provides notice within 5 days of the onset of the event, that it is invoking the protection of this provision; and

*(d)* notice shall include the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification as appropriate.

(ii) the remedial party has the burden of proving by a preponderance of the evidence that an event qualifies under this subsection.

**375-1.6 Work plans and reports.**

(a) Work plans.

(1) All work plans shall:

(i) be prepared and implemented in accordance with the requirements of all applicable laws, rules and regulations; and

(ii) consider Department guidance determined, after the exercise of engineering judgment, to be applicable on a case-specific basis.

(2) A proposed work plan shall be submitted for Department review and approval, as set forth in subdivision (d) of this section, and shall include, at a minimum, a schedule for performance of anticipated activities with sufficient detail to allow the Department to evaluate that work plan.

(3) If revisions or additions to an approved work plan are required to satisfy the objectives of

such work plan, the Department shall notify the remedial party. Within 15 days of the notice the remedial party shall elect in writing to:

(i) modify the work plan within 30 days of receipt of the written notice;

(ii) invoke dispute resolution; or

(iii) in the case of a brownfield site remedial program, the remedial party can also terminate the agreement in accordance with section 375-3.5.

(4) During all field activities, the remedial party shall have an on-site representative present who is qualified to supervise the activities undertaken. Such representative may be an employee or a consultant retained by the remedial party to perform such supervision.

(5) The Department shall be notified at least 7 days in advance of, and be allowed to attend, any field activities to be conducted under a Department approved work plan, as well as any pre-bid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting; provided, however that the Department shall not be permitted to attend portions of meetings where privileged matters are discussed.

(b) Reports.

(1) All reports, including but not limited to, all reports, design documents, plans or site management plans, with the exception of the final engineering report which is addressed in paragraph (4) below; which are submitted to the Department in draft or final form pursuant to an order, agreement or State assistance contract for any phase of the remedial program are to be submitted in accordance with the schedule contained in an approved work plan, another report or design document.

(2) Reports shall also include, but not be limited to, all:

(i) data generated relative to the site;

(ii) other information obtained as part of the implementation of the work plan; and

(iii) assessments and evaluations required by the work plan.

(3) Each final report, shall contain a certification by the person with primary responsibility for the day to day performance of the activities under the work plan. The certification shall:

(i) be on such form as provided by the Department and shall be included in the final report provided for approval;

(ii) be completed by a professional engineer, or such other qualified environmental professional as the Department may find acceptable; and

(iii) certify that all activities were performed in full accordance with the Department approved work plan.

(c) Final engineering report.

(1) In accordance with the schedule contained in an approved remedial work plan or remedial design, a final engineering report shall be submitted that includes but is not limited to:

(i) a description of activities completed pursuant to the approved remedial work plan;

(ii) site boundaries;

(iii) a description of any institutional controls that will be used, including mechanisms to implement, maintain, monitor, and enforce such controls; and

(2) The final engineering report shall be prepared in accordance with all relevant statutes and regulations and upon consideration of applicable guidance.

(3) The final engineering report be prepared by a professional engineer with primary responsibility for the day to day performance of the remedial program activities.

(4) The final engineering report shall include a certification by the professional engineer, that:

(i) such party is and at all pertinent times hereinafter mentioned was a currently registered

professional engineer;

(ii) such party is the individual who had primary direct responsibility for the implementation of the subject remedial program;

(iii) all substantive requirements of the said remedial program have been complied with;

(iv) the data demonstrates that remediation requirements have been or will be achieved in accordance with time frames contained in the approved remedial program;

(v) all activities described in this report have been performed in accordance with the said remedial program and any subsequent changes as agreed to and approved by the Department,

(vi) any use restrictions, institutional and/or engineering controls, and/or any site management plan requirements are contained in a duly recorded environmental easement and that every municipality in which the site is located has been notified of the environmental easement;

(vii) a site management plan for any engineering controls employed at the site has been approved; and

(viii) any required financial assurance mechanisms have been executed.

(5) The Department shall review the final engineering report, the submittals made in the course of the remedial program, and any other relevant information regarding the site and make a determination as to whether the goals of the remedial program have been or will be achieved in accordance with established time frames.

(6) The Department will issue a written certificate of completion, upon the Department's approval of the final engineering report.

(d) Review of work plans and reports.

(1) The Department shall approve, modify, or reject a proposed work plan or report submitted pursuant to an order, agreement or State assistance contract.

(2) Approval. Upon the Department's written approval of a work plan or report, such work plan or report shall:

(i) be incorporated into and become an enforceable part of any order, agreement or State assistance contract pertaining to the site's remedial program;

(ii) in the case of a:

*(a)* work plan, be implemented in accordance with the schedule contained therein; or

*(b)* report, the approval will initiate the next phase of the remedial program in accordance with the schedule for the remedial site; and

(iii) such work plan or report shall be placed by the remedial party in the site document repository.

(2) Modification. If the Department requests modification of a work plan or report by the remedial party, or provides a Department modified work plan or report, the reasons for such modification shall be provided in writing. Within 15 days of the notice, the remedial party shall elect in writing to:

(i) modify the work plan or report, or accept such Department modified work plan or report, within 30 days of receipt of the written notice;

(ii) invoke dispute resolution; or

(iii) in the case of a brownfield site remedial program, the remedial party may also terminate the agreement in accordance with subdivision 375-3.5.

(3) Disapproval. If the Department disapproves a work plan or report, the reasons for such disapproval shall be provided in writing. Within 15 days of the notice, the remedial party shall elect in writing to:

(i) modify the disapproved work plan or report, within 30 days of receipt of the written

notice;

(ii) invoke dispute resolution; or

(iii) in the case of a brownfield site remedial program, the remedial party can also terminate the agreement in accordance with subdivision 375-3.5.

**375-1.7 Reserved**

**375-1.8 Remedial program.**

(a) The goals of each remedial program are set forth respectively at subparts 375-2.8, 375-3.8, and 375-4.8. To achieve those goals, the Department may divide a site into operable units. Multiple work plans, reports, and decision documents may be approved and/or issued for a site. All remedial programs shall address bulk storage tanks or containment vessels, source removal and control and groundwater protection and control measures.

(b) Bulk storage tanks and containment vessels.

(1) All known petroleum storage tanks on the site, which are under the ownership or control of the remedial party, shall be registered as set forth in section 612.2 of this title;

(2) All known chemical storage tanks on the site, which are under the ownership or control of the remedial party, shall be registered as set forth in section 596.2 of this title;

(3) All such known tanks that are out-of-service, which are under the ownership or control of the remedial party, shall be closed as set forth in section 613.9 of this title (in the case of petroleum storage tanks) or section 598.10 of this title (in the case of chemical storage tanks); and

(4) Where any contaminant is found to be stored on the site in containment vessels other than storage tanks (such as drums, transformers, sumps, and pits), or where petroleum storage tanks or chemical storage tanks are discovered on the site during the course of the remedial program and such tanks contain any contaminant, such contaminants shall be removed and disposed of in accordance with all applicable State and federal requirements within a schedule approved by the Department.

(c) Source removal and control measures. The following is the hierarchy of source removal and control measures which are to be used, ranked from most preferable to least preferable:

(1) Removal and/or treatment. All free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid and/or grossly contaminated soil shall be removed and/or treated; provided however if the removal and/or treatment of all such contamination is not feasible, such contamination shall be removed or treated to the greatest extent feasible.

(2) Containment. Any source remaining following removal and/or treatment set forth in this subsection shall be contained; provided however if full containment is not feasible, such source shall be contained to the greatest extent feasible.

(3) Elimination of exposure. Exposure to any source remaining following removal, treatment and/or containment set forth in this subsection shall be eliminated through additional measures, including but not limited to, as applicable, the timely and sustained provision of alternative water supplies and the elimination of volatilization into buildings; provided however if such elimination is not feasible such exposure shall be eliminated to the greatest extent feasible.

(4) Treatment of source at the point of exposure. Treatment of the exposure resulting from a source of environmental contamination at the point of exposure, as applicable, including but not limited to wellhead treatment or the management of volatile contamination within buildings, shall be considered as a measure of last resort.

(d) Groundwater protection and control measures. All remedial programs shall consider the protection of groundwater and will consider Department guidance, including but not limited to the Groundwater Strategy

issued set forth in ECL 15-3109. The following is the hierarchy of measures which are to be used, ranked from most preferable to least preferable:

(1) Source removal or control as set forth in subdivision (c) of this section.

(2) Plume containment /stabilization. All remedies shall, to the extent feasible, prevent the further migration of groundwater plumes, whether on-site or off-site. The consideration of alternatives will include an evaluation of feasible remedial alternatives that can achieve groundwater plume containment/stabilization.

(3) Groundwater quality restoration. Restoration of groundwater shall be evaluated to determine the feasibility of measures to restore groundwater quality to meet standards.

(e) Scope of the investigation.

(1) The goals of a remedial investigation include, but are not limited, to the:

(i) delineation of the areal and vertical extent of the contamination in, or emanating from, all media at the site and the nature of that contamination;

(ii) characterization of the surface and subsurface characteristics of the site, including topography, surface drainage, stratigraphy, depth to groundwater, and any aquifers that have been impacted or have the potential to be impacted;

(iii) identification of the sources of contamination, the migration pathways and actual or potential receptors of contaminants;

(iv) evaluation of actual and potential threats to public health and the environment; and

(v) production of data of sufficient quantity and quality to support the necessity for, and the proposed extent of, remediation and to support the evaluation of proposed alternatives;

(2) Historical data may be submitted in lieu of collecting new data or to supplement new data provided the appropriate quality assurance requirements are met and the data was collected in a manner consistent with appropriate sampling protocols. All detailed information must be referenced in the reports including sampling protocols.

(f) Remedy selection. The Department shall select a remedy upon consideration of the following factors:

(1) Overall protectiveness of the public health and the environment;

(2) Standards, criteria and guidance;

(i) conformity to standards and criteria that are generally applicable, consistently applied, and officially promulgated, that are either directly applicable, or that are not directly applicable but are relevant and appropriate, unless good cause exists why conformity should be dispensed with. Good cause exists if any of the following is present:

*(a)* the proposed action is only part of a complete program or project that will conform to such standard or criterion upon completion;

*(b)* conformity to such standard or criterion will result in greater risk to the public health or to the environment than alternatives;

*(c)* conformity to such standard or criterion is technically impracticable from an engineering perspective;

*(d)* the program or project will attain a level of performance that is equivalent to that required by the standard or criterion through the use of another method or approach; or

(ii) consideration shall also be given to guidance determined, after the exercise of scientific and engineering judgment, to be applicable;

(3) Long-term effectiveness and permanence: a program or project that achieves a complete and permanent cleanup of the site is to be preferred over a program or project that does not do so;

(4) Reduction in toxicity, mobility or volume of contamination through treatment: a program or project that permanently and significantly reduces the toxicity, mobility or volume of contamination is to be

preferred over a program or project that does not do so. The following is the hierarchy of technologies ranked from the most preferable to the least preferable:

(i) destruction, on-site or off-site;

(ii) separation or treatment, on-site or off-site;

(iii) solidification or chemical fixation, on-site or off-site; and

(iv) control and isolation, on-site or off-site.

(5) Short-term impacts and effectiveness;

(6) Implementability;

(7) Cost-effectiveness, including capital costs and annual site maintenance plan costs;

(8) Community acceptance;

(9) Land use, provided the Department determines that there is reasonable certainty associated with such use. In assessing reasonable certainty, the Department shall consider:

(i) the current, intended, and reasonably anticipated future land uses of the site and its surroundings shall be considered, in the selection of a the remedy for soil remediation, under the brownfield cleanup and environmental restoration programs, and may be considered in the State superfund program, when cleanup to pre-disposal conditions is determined not feasible;

(ii) if the use proposed for the site does not conform with applicable zoning laws or maps or the reasonably anticipated future use of the site as determined by the Department, the Department shall not approve a remedy based on such use, unless it:

*(a)* is based on a cleanup level that would require less restriction than the level consistent with current zoning laws or maps; or

*(b)* can be shown to the Department's satisfaction that zoning changes are or will be sought, in which event the Department will conditionally approve the remedy but shall not issue a certificate of completion until such use is consistent with existing zoning laws or maps; and

(iii) the reasonably anticipated future use of the site and its surroundings shall be documented in the analysis of alternatives taking into consideration factors including, but not limited to the following:

*(a)* current use and historical and/or recent development patterns;

*(b)* applicable zoning laws and maps;

*(c)* brownfield opportunity areas as designated set forth in GML 970-r;

*(d)* applicable comprehensive community master plans, local waterfront revitalization plans as provided for in EL article 42, or any other applicable land use plan formally adopted by a municipality;

*(e)* proximity to real property currently used for residential use, and to urban, commercial, industrial, agricultural, and recreational areas;

*(f)* any written and oral comments submitted by members of the public on the proposed use;

*(g)* environmental justice concerns, which for purposes of this subpart, include the extent to which the proposed use may reasonably be expected to cause or increase a disproportionate burden on the community in which the site is located, including low-income minority communities, or to result in a disproportionate concentration of commercial or industrial uses in what has historically been a mixed use or residential community;

*(h)* federal or State land use designations;

*(i)* population growth patterns and projections;

*(j)* accessibility to existing infrastructure;

*(k)* proximity of the site to important cultural resources, including federal or State historic or heritage sites or Native American religious sites;

*(l)* natural resources, including proximity of the site to important federal, State or local natural resources, including waterways, wildlife refuges, wetlands, or critical habitats of endangered or threatened species;

*(m)* potential vulnerability of groundwater to contamination that might emanate from the site, including proximity to wellhead protection and groundwater recharge areas and other areas identified by the Department and the State's comprehensive groundwater remediation and protection program established set forth in ECL article 15 title 31;

*(n)* proximity to flood plains;

*(o)* geography and geology; and

*(p)* current institutional controls applicable to the site.

(g) Use of a site. The use of a site shall be either for unrestricted or restricted use, with the exclusion of any use as a farm. The Department's use determination does not authorize a use of real property that is otherwise prohibited by zoning, provided, however, such determination may prohibit or restrict uses of real property which are authorized by zoning or by law. Such uses will fall into one of the following categories:

(1) "Unrestricted use" means use without imposed restrictions, such as environmental easements or other land use controls.

(2) "Restricted use" means use with imposed restrictions, such as environmental easements, which as part of the remedy selected for the site require a site management plan which relies on institutional controls or engineering controls to manage exposure to contamination remaining at a site. Restricted uses include:

(i) "Restricted-residential use" means a land use category which shall only be considered when there is common ownership or a single owner of the site, e.g., apartment complexes, townhouse developments, mixed use high rise development or condominium developments, etc.

*(a)* restricted-residential use shall, at a minimum, include restrictions which prohibit:

*(1)* any vegetable gardens on a site, although community vegetable gardens may be considered with Department approval; and

*(2)* single family housing.

*(b)* restricted-residential land uses could include, but are not limited to:

*(1)* residences, as restricted above; day care facilities; schools, college residential buildings and other educational institutions; nursing homes, elder care and other long-term health care facilities; and

*(2)* active recreational uses, such as playgrounds, picnic areas, playing fields or other public uses with a reasonable potential for soil contact.

(ii) "Restricted-commercial use" means a land use for the primary purpose of buying, selling or trading of merchandise or services.

*(a)* restricted-commercial uses include, but are not limited to:

*(1)* warehouses; building supply facilities; retail gasoline stations; automobile service stations; automobile dealerships; retail warehouses; repair and service establishments for appliances and other goods; professional offices; college classroom, laboratory, administrative or other non-residential buildings; banks and credit unions; office buildings; retail businesses selling food or merchandise; hospitals and clinics; religious institutions; hotels; motels; parking facilities; and

*(2)* passive recreational uses, such as golf courses, bike or walking paths, tennis courts, green space or other public uses with limited potential for soil contact.

*(b)* excluded from this use category are any of the examples cited in (i) or (iii) of this section.

(iii) "Restricted-industrial use" means a land use for the primary purpose of manufacturing, production, fabrication or assembly process and ancillary services.

*(a)* restricted-industrial uses include, but are not limited to: power plants; manufacturing facilities such as metalworking shops, plating shops, blast furnaces, coke plants, oil refineries, factories, chemical plants and plastics plants; assembly plants; non-public airport areas; limited access highways; railroad switching yards; and marine port facilities.

*(b)* excluded from this use category are any of the examples cited in (i) or (ii) of this section.

(h) Institutional controls, engineering controls and environmental easements.

(1) Institutional and engineering controls. A remedy that includes institutional controls and/or engineering controls must include the following:

(i) a complete description of any use restrictions and/or institutional controls, their role in achieving the remedial objectives of the remedy and the mechanisms that will be used to implement, maintain, monitor, and enforce such restrictions and controls;

(ii) a complete description of any engineering controls and any site management plan requirements, including the mechanisms that will be used to continually implement, maintain, monitor, and enforce such controls and requirements;

(iii) an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls and analysis of the long-term costs of implementing, maintaining, monitoring and enforcing such controls; including costs that may be borne by state or local governments, to accomplish this:

*(a)* The remedial party must submit to the Department a detailed written estimate of the cost, in current dollars, for implementing the institutional or engineering controls. The cost estimate must be based on the cost of implementing the institutional or engineering controls as set forth in the remedial work plan; and

*(b)* The cost estimate for implementing the institutional control/engineering controls must reflect consideration of the size, type, and location of the area subject to the institutional or engineering controls; and the remedy and the nature and extent of contamination subject to the institutional control/engineering controls;

(iv) analysis sufficient to support a conclusion that effective implementation, maintenance, monitoring and enforcement of institutional and/or engineering controls can be reasonably expected;

(v) where required by the Department, financial assurance, in accordance with subdivision 375-1.11(c), to ensure the long term implementation, maintenance, monitoring, and enforcement of any such controls; and

(vi) any engineering control must be used in conjunction with institutional controls to ensure the continued integrity of such engineering control.

(2) Environmental easements.

(i) Any institutional controls, engineering controls, use restrictions and/or any site management requirements applicable to the remedial site are to be contained in an environmental easement, which shall be:

*(a)* created and recorded pursuant to ECL article 71 title 36;

*(b)* in a form and manner as prescribed by the Commissioner;

*(c)* in compliance with GOL 5-703.1 and ECL 71-3605.2; and

*(d)* recordable pursuant to RPL 291.

(ii) Agents, employees or other representatives of the State may enter and inspect the property burdened by an environmental easement with 10 days prior notice to the property owner, to assure compliance with the restrictions identified by the environmental easement.

(3) Institutional control/engineering control certification.

(i) The owner or the remedial party at a site at which institutional or engineering controls are employed as part of a remedy, must annually submit, unless an alternate certification period is provided in writing by the Department, a written certification:

*(a)* by a professional engineer, or by such other qualified environmental professional as the Department may find acceptable as set forth in ECL27-1415(b); or

*(b)* where the only control is an institutional control on the use of the property, the certification may be made by the property owner.

(ii) The certification shall be included in a report summarizing the site management effort for the certification period, in such form and manner as the Department may require, and shall certify that:

*(a)* the inspection of the site to confirm the effectiveness of the institutional and engineering controls required by the remedial program was performed under the direction of the individual identified in paragraph (1) of this subdivision;

*(b)* the institutional controls and/or engineering controls employed at such site:

*(1)* are in-place;

*(2)* are in the Department-approved format; and

*(3)* that nothing has occurred that would impair the ability of such control to protect the public health and environment;

*(c)* the owner will continue to allow access to such real property to evaluate the continued maintenance of such controls;

*(d)* nothing has occurred that would constitute a violation or failure to comply with any site management plan for such controls;

*(e)* this document and all attachments were prepared under the direction of, and reviewed by, the party making the certification;

*(f)* to the best of his/her knowledge and belief, the work and conclusions described in this certification are in accordance with the requirements of the site remedial program, and generally accepted engineering practices; and

*(g)* the information presented is accurate and complete.

(iii) Only one such certification shall be filed per site. If a site is comprised of multiple properties or parcels, the remedial party shall arrange to file one consolidated certification;

(iv) In the event that the certification cannot be provided due to a failure of one or more of the institutional or engineering controls, a letter must be sent to the Department explaining the cause for such failure and providing a work plan to implement the corrective actions necessary in order to be able to provide the certification and a schedule for those corrective measures.

(v) This work plan will be reviewed by the Department as set forth in subdivision 375-1.6(d) and the remedial party and the owner shall proceed to implement the corrective measures in accordance with the approved work plan. A certification, meeting the requirements of subparagraph (ii) above, shall be submitted upon completion of the corrective measures.

**375-1.9 Certificate of completion.**

(a) A certificate shall be issued for the real property constituting the site, upon a determination that

either:

(1) The final engineering report is approved; or,

(2) A no further action decision document is issued.

(b) The Department shall issue the certificate of completion to the remedial party which has signed the order, agreement or State assistance contract.

(c) A certificate of completion shall include all of the following:

(1) An acknowledgment that the requirements of the remedial program were satisfied;

(2) A description of the site by adequate legal description or by reference to a plat showing the boundaries, or by other means sufficient to identify site location with particularity;

(3) A prohibition against the use of the site in a manner inconsistent with any land use limitation imposed as a result of such remediation efforts without additional appropriate remedial activities;

(4) A statement that the Department's issuance of the certificate of completion entitles the remedial party to certain liability benefits as set forth in sections 375-2.9, 375-3.9 and 375-4.9;

(5) A description of any engineering and institutional controls or monitoring required by the approved work plan and notification that failure to manage the controls or monitoring in full compliance with the terms of the remedial program may result in revocation of the certificate of completion;

(d) A notice of the certificate of completion must be recorded in the recording office for the county (or counties) where any portion of the site is located within 30 days of its issuance. Proof of such recording shall be submitted to the Department within 30 days after recording.

(e) Modification or revocation of a certificate of completion.

(1) A certificate of completion may be modified or revoked by the Department upon a finding that:

(i) the remedial party has failed to manage the controls or monitoring in full compliance with the terms of the remedial program, as set forth in paragraph 375-1.9(c)(5);

(ii) there has been a failure to comply with the terms and conditions of any order, agreement or State assistance contract executed by the Department;

(iii) there was a misrepresentation of a material fact tending to demonstrate that the cleanup levels were reached;

(iv) the terms and conditions of the environmental easement have been intentionally violated; or

(v) for good cause.

(2) If the Department seeks to modify or vacate a certificate of completion, it shall:

(i) provide notice to the certificate holder which shall specify the basis for the Department's proposed action and facts in support of that action; and

(ii) mail notices by certified mail. The effective date of the notice shall be five days after mailing.

(3) The certificate holder may seek relief from the notice as set forth in sections 375-2.9, 375-3.9 and 375-4.9.

(f) Transfer of a certificate of completion. A certificate of completion may be transferred to successors and assigns of the remedial party or parties named in the certificate.

(1) The Department shall be provided:

(i) Advance notice as set forth in subdivision 375-1.11(d); and

(ii) Within 30 days of the transfer, a notice of transfer, on a Department-approved form, shall be filed in accordance with the filing requirements of the original certificate set forth in subsection (d) of this section.

(2) Upon filing of the notice, the certificate of completion shall be deemed issued to the successor or assign.

**375-1.10 Citizen participation.**

(a) All remedial programs shall include citizen participation activities which, at a minimum, include, but are not limited to, the preparation of a citizen participation plan, establishment of a document repository, public notice with a prescribed comment period at select milestones, with meetings and informational sessions.

(b) Within 20 days of the effective date of the order, agreement or State assistance contract, the remedial party shall submit a citizen participation plan which shall include the following minimum elements:

(1) A site contact list;

(2) The name and address of a document repository and proof of acceptance of this designation by the repository;

(3) Overview of the site's history and contamination issues;

(4) Identification of major issues of public concern related to the site and a description of any mitigation planned to address the issues, if appropriate;

(5) A description and schedule of the major elements of the site's remedial program;

(6) A description and schedule of public participation activities conducted or planned relative to the site; and

(7) A description and schedule of any additional public participation activities needed to address public concerns.

(c) All citizen participation plans and fact sheets will be subject to Department review and approval. The citizen participation plan will be updated during the implementation of the remedial program.

(d) Document repository. A document repository shall be established at a location accessible to citizens where they can review the remedial program documents.

(1) Documents shall be placed in the repository, which are:

(i) approved by the Department set forth in subdivision 375-1.6(d); or

(ii) otherwise designated by the Department for inclusion.

(2) The remedial party shall ensure that all appropriate documents are in the repository.

(3) The Department may allow an internet repository to be used to satisfy this requirement.

(e) Comment period extensions.

(1) The Department shall consider a request to extend a comment period provided such request is received within 5 days prior to the identified end of the comment period.

(2) The time allotted for extensions shall not be greater than 30 days.

(3) Additional notice is not required upon granting an extension.

(f) Interim remedial measures. For interim remedial measures, the Department will require such citizen participation activities, if any, as are appropriate upon consideration of applicable guidance.

**375-1.11 Miscellaneous**

(a) Submissions to the Department. All work plans; reports, including all attachments and appendices, and certifications, submitted by a remedial party shall be submitted in print, as well as in an electronic format acceptable to the Department.

(b) Prohibitions.

(1) No person shall obstruct or attempt to obstruct any duly designated officer or employee of the Department or of any other State agency, or any agent, consultant, contractor or other person, including an employee, agent, consultant or contractor of a remedial party acting at the direction of the Department, or so

authorized in writing by the Department, acting set forth in article 27 of the ECL or title 5 of article 56 of the ECL or any combination of same.

(2) No person shall engage in any activity that will, or that is reasonably:

(i) anticipated to, prevent or interfere significantly with any proposed, ongoing, or completed remedial program at any site; or

(ii) foreseeable to, expose the public health or the environment to a significantly increased threat of harm or damage at any site.

(c) Financial assurance.

(1) Applicability. The Department may require, as a condition of a accepting institutional or engineering controls, that the remedial party post financial assurance to contain, mitigate, and remediate any impact resulting from a failure of such institutional or engineering controls. Financial assurance required under this Part shall be in effect and on file with the Department before any certificate of completion is issued. Allowable financial assurance mechanisms include:

(i) trust funds;

(ii) surety bond guaranteeing payments;

(iii) letters of credit; or

(iv) insurance.

(2) Preparation of estimated amount of financial assurance. If the Department requires posting of financial assurance as a condition of accepting institutional or engineering controls, the remedial party shall provide an estimated amount of financial assurance for the Department's consideration. Such party is responsible for having a professional engineer or other qualified individual prepare the estimate, and in the event the financial assurance is being provided through environmental insurance, an independent insurance professional shall provide a certification that such policy will meet the requirements of this Section. The estimate must include an itemized listing of each cost and how the cost was calculated, including the cost of contracting with a third party.

(3) Department review of estimated amount of financial assurance. Upon receipt of the financial assurance estimate, the Department shall review the estimate and shall assess the basis for the type and extent of impacts used in calculations, and whether the estimated amount is sufficient. The Department may accept, modify, or reject the financial assurance estimate.

(4) Submittal of financial assurance. After approval of the financial assurance amount and prior to the Department's issuance of a certificate of completion, the remedial party must submit an originally signed financial assurance mechanism to the Department. The mechanism must be in effect when submitted. A remedial party may satisfy this requirement by establishing one or more financial assurance mechanisms. If multiple financial assurances are used, the remedial party shall specify at least one such assurance as "primary" coverage and shall specify the other assurance as "excess." Additionally, a remedial party with obligations for providing financial assurances for multiple sites can combine the required financial assurances for all sites into one or more financial assurance mechanisms.

(5) Adjustment of amount of financial assurance. The dollar amount of financial assurance shall be reviewed at least once every five years. During the review, the Department may adjust the amount for inflation based on the United States consumers price index. In addition, the remedial party may request that the amount of financial assurance be adjusted based on factors occurring since the posting of the existing financial assurance. The remedial party shall describe in writing the basis for the adjustment request.

(6) Release of financial assurance. The Department may release the requirement for financial assurance or a portion of the financial assurance. After the Department has released the requirement, the Department shall notify the remedial party in writing.

(7) Substitution of financial assurance. If the remedial party requests substitution of one type

of financial assurance for another, such party shall submit to the Department a proposal for alternate financial assurance. The alternate financial assurance must be as secure or more secure than the existing financial assurance as determined by the Department. Upon approval and receipt of the alternate financial assurance by the Department, the Department shall release the existing financial assurance and the Department shall notify the remedial party in writing.

(d) Change of use.

(1) At least 60 days before a change of use at a site, as defined in suparts 375-2, 375-3 and 375-4, the person proposing to make such change of use shall provide written notification to the Department.

(2) The notice shall advise the Department of the contemplated change, including but not limited to explaining how such change may affect the site`s proposed, ongoing, or completed remedial program.

(3) Where such change results in a change in ownership or responsibility for the proposed, ongoing, or completed remedial program, such notice shall include but not be limited to the name of the proposed owner and contact information, including a contact representative and the contact information for such representative.

**375-1.12 Permits**

(a) When the Department develops and implements a remedial program set forth in ECL 27-1313.1, ECL 27-1313.5, ECL 27-1411.5 or ECL 56-0509.4, the Department shall be exempt from the requirement to obtain any Department issued permits for sites if:

(1) The activity is conducted on the site or on premises that are under common control or are contiguous to or physically connected with the site and the activity manages exclusively contamination which the Department is handling as part of the site remedial program;

(2) All substantive technical requirements applicable to like activity conducted set forth in a permit are complied with, as determined by the Department; and

(3) The activity is a component of a program selected by a process complying with the public participation requirements of section 375-1.10 of this Part, to the extent applicable.

(b) The Department may exempt a remedial party from the requirement to obtain any Department issued permits for sites if:

(1) The activity is conducted on the site or on premises that are under common control or are contiguous to or physically connected with the site and the activity manages exclusively contamination which the remedial party is handling as part of the site remedial program;

(2) All substantive technical requirements applicable to like activity conducted pursuant to a permit are complied with, as determined by the Department; and

(3) The activity is a component of a program selected by a process complying with the public participation requirements of section 375-1.10 of this Part, to the extent applicable.

(c) The Department will require applicable State and local permits which are not issued by the Department unless there is a demonstration that obtaining such State or local permit will substantially delay the project or present a hardship, then the Department may exempt the need to obtain such State or local permits provided:

(1) The remedial program or activity is conducted on the site or on premises that are under common control or are contiguous to or physically connected with the site and the activity manages exclusively contamination which the Department or remedial party is handling as part of the site remedial program;

(2) All substantive technical requirements applicable to like activity conducted pursuant to a permit are complied with, as determined by the Department; and

(3) The activity is a component of a program selected by a process complying with the public

participation requirements of section 375-1.10 of this Part, to the extent applicable.

(d) The Department may require a remedial party to follow the Department application process even where the exemption is granted, in which event no formal permit would be issued.

(e) If, in the course of implementing a remedial program, any storage tank(s) subject to regulation under 6 NYCRR Parts 596-599 or 612-614, are discovered and found not to be registered or not being operated in accordance with the applicable regulatory requirements, such tank(s) shall be registered and either closed in accordance with regulatory requirements or brought into compliance with the applicable regulatory requirements. These requirements:

(1) apply in full to the remedial program at a site when a responsible party or a participant as defined in paragraph 375-3.2(b)(1), implements a remedial program pursuant to ECL 27-1313.1, ECL 27-1313.5, or ECL 27-1411.5; or

(2) apply in full except, that payment of a registration fee shall not be required where the Department funds all or part of a remedial program pursuant to ECL 27-1313.1, ECL 27-1313.5, or ECL 56-0503, or a volunteer as defined in paragraph 375-3.2(b)(2) undertakes the remedial program, provided the tank(s) is to be closed as part of the remedial program for the site.

(f) All required federal permits must be obtained.

# Subpart 375-2
# Inactive Hazardous Waste Disposal Site Remedial Program

Part 375-2 deleted new language follows

**375-2.1 Purpose; applicability.**

This subpart applies to the development and implementation of inactive hazardous waste disposal site remedial programs. This subpart addresses requirements in addition to those requirements identified in subpart 375-1.

**375-2.2 Definitions.**

As used in this subpart, the following terms have the following meanings:

(a) "Change of use" means the erection of any structure on a site, the paving of a site for use as a roadway or parking lot, the creation of a park or other recreational facility on a site, any activity that is likely to disrupt or expose hazardous waste or increase direct human exposure, or any other conduct that will or may tend to prevent or significantly interfere with a proposed, ongoing, or completed program.

(b) "Contaminant" means contaminant as defined in subdivision 375-1.2(g), excluding petroleum.

(c) "Contaminated" or "contamination" means the presence of a contaminant, as defined in this subpart, in any environmental media, including soil, surface water, groundwater, soil vapor, air or indoor air.

(d) "Cost" means, for purposes of a state assistance contract, the cost of an approved project, which shall include engineering and architectural services, plans and specifications, consultant and legal services, and other direct expenses incident to such project less any federal or State assistance received or to be received and any other assistance from responsible parties or otherwise.

(e) "Feasibility study" means a study undertaken to develop and evaluate alternatives for remediation, emphasizing data analysis. The remedial investigation data are used to define the objectives of the site remedial program, to develop remedial action alternatives, and to undertake an initial screening and detailed analysis of the alternatives. The term also refers to a report that describes the results of the study.

(f) "Municipality" means a city, county, town, village, public benefit corporation or school district or an improvement district within a city, county, town, or village, or Indian tribe residing within the State, or any combination thereof.

(g) "Responsible party" means any of the following, subject to the defenses, exemptions, and/or limitations set forth at ECL 27-1323:

(1) Any person who currently owns or operates a site or any portion thereof;

(2) Any person who owned or operated a site or any portion thereof at the time of disposal of hazardous waste;

(3) Any person who generated any `hazardous waste disposed at a site;

(4) Any person who transported any hazardous waste to a site selected by such person;

(5) Any person who disposed of any hazardous waste at a site;

(6) Any person who arranged for:

(i) the transportation of any hazardous waste to a site; or,

(ii) the disposal of any hazardous waste at a site; and

(7) Any other person who is responsible according to the applicable principles of statutory or common-law liability pursuant to ECL 27-1313.4 and/or CERCLA.

**375-2.3 Municipal eligibility for State assistance.**

(a) The Commissioner may provide State assistance to a municipality under ECL 27-1313.5(g), up to 75 percent of eligible costs as determined by subdivisions (e) and (f) of this section, subject to the conditions and limitations of subdivisions (b), (c) and (d) of this section.

(b) Eligible sites. A site must meet the following criteria to be eligible:

(1) The site is a class 1 or class 2 site on the Registry due to disposal of hazardous waste; and

(2) The site must be owned by the municipality.

(c) Eligible municipality. A municipality must meet the following criteria to be eligible:

(1) It must be a responsible party only by reason of being or having been the owner or operator of the site; and

(2) It must enter into an order described in subdivision 375-2.5(a) or another order acceptable to the Department, whereby the municipality is obligated to develop and implement a site remedial program subject to the approval and supervision of the Department; and such order must be entered into before submitting an application for assistance.

(d) Municipal responsibilities. The municipality must:

(1) Take all reasonable steps to obtain indemnification or a commitment to indemnify from any insurance carriers; for purposes hereof, the phrase, "all reasonable steps to obtain indemnification" means:

(i) the diligent conduct of a search to identify all insurers that provided liability coverage for the municipality at any relevant time by reviews of its own records;

(ii) the diligent conduct of negotiations with all identified insurers. Negotiations have been conducted diligently with a particular insurer when the municipality extends an invitation to negotiate concerning indemnification under its policy, and the insurer:

*(a)* does not respond to the municipality's invitation;

(*b*) responds to it by refusing to negotiate;

*(c*) starts negotiations and thereafter discontinues same;

(*d*) starts negotiations and refuses to indemnify under the policy within nine months after the start of negotiations; and

(iii) when reasonable, the commencement and diligent prosecution of a civil judicial action to obtain appropriate relief from any identified insurer;

(2) Make all reasonable efforts to secure voluntary agreement by other responsible parties to perform or pay for the performance of the remedial program for the site. For purposes of this section, the phrase "all reasonable efforts to secure voluntary agreement" means:

(i) the diligent conduct of a search to identify responsible parties by a method or methods appropriate to the circumstances of the particular site (including, but not limited to, reviews of real property records, regulatory files of appropriate government agencies, publicly available financial information, and private business records obtained under ECL 27-0915, 27-1307, and/or 27-1309); and

(ii) the selection of a person responsible for the site that the municipality determines (and in which determination the Department concurs) to be an appropriate party with which to negotiate; and

(iii) diligent conduct of negotiations with that responsible party.

(3) Conduct diligent negotiations with responsible parties. Negotiations have been conducted diligently with that particular responsible party when:

(i) the municipality extends an offer to negotiate an agreement to perform the municipality's obligation under an order, and that party

*(a)* does not respond to the municipality's offer, or

*(b)* responds to it by refusing to negotiate, or

*(c)* starts negotiations and thereafter discontinues same, or

*(d)* starts negotiations and does not agree to undertake the objective of the negotiations within six months after the commencement of negotiations (or such longer period as the Department determines will be promotive of attaining the objective of the negotiations); or

*(e)* demonstrates to the municipality's satisfaction that it is unable to pay for the objective of the negotiation; and

(ii) the Department concurs in the reasonableness of the municipality's actions.

(4) Assist the Department and other State agencies in compelling responsible parties to contribute to the cost of the remedial program, such assistance encompassing, at a minimum, the provision of all information which the municipality has or acquires during the course of project implementation, and thereafter, related to the identification of the responsible parties for the contaminants disposed at, or released from, the site.

(5) Cooperate with the State in its cost recovery efforts, including:

(i) the development of evidence or legal argument with respect to:

*(a)* the equitable allocation of costs to the municipality;

*(b)* the liability for, and equitable allocation of costs to, other potentially responsible parties;

*(c)* the implementation of the remedial program and the recoverability of particular costs incurred at the site; and

*(d)* any other issues likely to substantially affect the State's recovery of costs; and

(ii) negotiation of the settlement (if applicable).

(e) Eligible costs. The following costs are eligible for assistance:

(1) the non-federal share of the approved site remedial program cost less amounts collected from responsible parties or otherwise as contemplated by ECL article 27 title 13, including reasonable costs for engineering and architectural services, plans and specifications, and consultant and legal services; and

(2) the cost of other activities directly incidental to the conduct of an approved site remedial program.

(f) Ineligible costs. The following costs are not eligible for being considered in the calculation of State assistance, those incurred:

(1) before the start date identified in the State assistance contract, including those to prepare and submit the State assistance application and those to procure and retain legal, engineering, and other services to undertake the project;

(2) to undertake site management at the site after construction of the Department-approved remedy;

(3) to redevelop the site that are not necessary to remediate the site.

(4) that are reimbursed by, or recovered from, any other responsible party or insurance carrier or the federal government;

(5) outside the scope of, or in violation of, the order and/or State assistance contract;

(6) in violation of applicable statutes or regulations; and

(7) for which appropriations are not available;

**375-2.4 Applications for municipal assistance.**

(a) An application by a municipality to implement a remedial program with State assistance shall be submitted to the Department in such form and manner, and containing such information as the Department may require. One copy of the application form and any attachments shall be submitted in an electronic format acceptable to the Department.

(b) The scope of the application must be for the full remedial program for the site.

(c) The application shall be signed by the individual authorized to sign the application on behalf of the municipality and include the following certifications:

(1) The applicant has not generated, transported or disposed of, arranged for, or caused the generation, transportation or disposal of any hazardous waste on that site;

(2) Has not undertaken, and will not undertake, any indemnification obligation respecting a party responsible under law for the remediation of the site; and

(3) All statements made for the purpose of obtaining State assistance for the proposed project either are set out in full on this application, or are set out in full in exhibits attached to this application and incorporated by this reference;

**375-2.5 Orders and State assistance contracts.**

(a) Orders

(1) The Commissioner may order a responsible party to develop and implement a remedial program for a site after providing notice and an opportunity for hearing to the alleged responsible party. A hearing required by ECL 27-1313.4 shall be conducted pursuant to the procedures of 6 NYCRR Part 622; provided, however, that, anything in said Part 622 to the contrary notwithstanding, there shall be no third-party, counterclaim, or crossclaim practice.

(2) The Commissioner may order a responsible party to develop and implement a remedial program for a site upon the consent of such responsible party without providing notice and an opportunity for hearing.

(3) The order for a remedial program developed set forth in this subdivision shall include all provisions set forth in subdivision 375-1.5(b) and also include the following provision:

(i) Indemnification. Unless otherwise approved by the Department, a remedial party shall indemnify and hold the State, the Trustee of the State's Natural Resources, and their representatives and employees harmless from any claim, suit, action, and cost of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the remedial program except for those claims, suits, actions, and costs arising from the gross negligence or willful or intentional misconduct by the State of New York, and/or its representatives and employees during the course of any activities conducted pursuant to the remedial program. The Department shall provide written notice no less than 30 days prior to commencing a lawsuit seeking indemnification.

(b) State assistance contracts for municipalities.

(1) Upon approval by the Department of an application for assistance under section 375-2.3, the municipality must enter into a State assistance contract with the Department. The State assistance contract will be subject to approval by the State Comptroller and, as to form, by the Attorney General, and:

(i) in addition to such further terms and conditions as the Department may require in the State assistance contract, the State assistance contract shall be deemed to include, and the municipality shall comply with, all of the provisions set forth in subdivision subparagraph 375-1.5(b) (1) and (4) and 375-4.5(b)(9);

(ii) include the terms and conditions set forth in paragraphs (2) through (6) below; and

(iii) shall be binding upon the municipality.

(2) The municipality must not enter into, or renew, a lease concerning, nor transfer title to, the site, or any portion of it, until the municipality binds itself and its lessees and its successors in title, to the following:

(i) the site is remediated under Department oversight in accordance with the Department's record of decision and that the site, or any subdivided parcel within the site, is not used for any purpose until it is so remediated, except that the site may continue to be used for the purpose for which it is being used as of the effective date of the state assistance contract, if the Department determines that the existing state of contamination does not pose a risk sufficient to prohibit such use from continuing, giving due regard for public health and environmental protection;

(ii) if, before the Department issues the certificate of completion, the municipality, or a successor in title, wishes to transfer title to or subdivide the site into separate parcels, it may do so after it commits in a document, approved by the Department in form and substance, to remediate all of the site in accordance with the Department's record of decision, within such time period as the Department may require;

(iii) the site will not be used for any purpose requiring a level of contamination lower than

that serving as the basis for the remediation identified in the record of decision; and

(iv) any engineering and/or institutional controls, that the Department may deem necessary to allow the contemplated use of the site to proceed will be imposed and maintained. The municipality develop and submit to the Department for its review and approval, a plan to ensure that such controls are continually maintained in the manner the Department may require. The municipality and its lessees and successors in title are prohibited from challenging the imposition or continuance of such controls, and failure to implement the Department-approved plan or to maintain such controls shall constitute a violation of the State assistance contract;

(3) If any responsible party payments and/or other responsible party consideration become available to the municipality which were not included when the State share was calculated for the State assistance contract, the municipality shall immediately notify the Department of such availability and the Department shall recalculate the amount of the State share. The Department has the option of either reducing the Contract amount if the project is ongoing or requesting reimbursement of the amount owed to the State, for deposit in an appropriate account. The State will calculate the amount owed by the Municipality based on the recalculated State assistance amount and the amount the State has reimbursed the municipality as of the date the recalculation is made. If the municipality shall fail to make such repayment within sixty (60) days of notification, the Department may take measures provided by statute relating to the recovery of State assistance. The municipality agrees that it will immediately notify the Department in writing of its receipt of reimbursement from other sources for any expenditure for which State assistance may be provided under the State assistance contract.

(4) The Department will suspend payments under the State assistance contract until the municipality has cured the failure, if the Commissioner determines that the municipality:

(i) has failed to comply with any of the requirements of applicable State or federal laws and regulations;

(ii) has failed to comply with any of the requirements of the State assistance contract;

(iii) without good cause, as determined by the Department, the municipality has failed to initiate, proceed with, or complete the Department-approved project in accordance with its schedule; or

(iv) has changed the Department approved project or any portion thereof without the Department's prior written approval.

(5) The Department may terminate the State assistance contract if the failure as set forth in paragraph (4) is not cured in a reasonable time.

(6) While the municipality may make efforts to recover response costs from responsible parties, it must provide the Department with timely advance written notice of any negotiations, proposed agreements, proposed settlements or legal action by which recovery is sought and must not commence such legal action nor enter into any such proposed agreement or settlement without prior written Department approval.

(c) State assistance contract for technical assistance grants.

(1) The State assistance contract for technical assistance grants shall contain such terms and conditions as the Commissioner may deem to be appropriate.

(2) The terms and conditions set forth in subdivision 375-1.5(b) and subdivision (b) of this section will not apply to a State assistance contract for technical assistance grants.

**375-2.6 Reserved.**

**375-2.7 Significant threat and Registry determinations.**

(a) Significant threat.

(1) The Commissioner may find that hazardous waste disposed at a site constitutes a significant threat to public health and/or the environment if, after reviewing the available evidence and considering the factors

the Commissioner deems relevant set forth in this section, the Commissioner determines that the hazardous waste disposed at the site or coming from the site results in, or is reasonably foreseeable to result in, any of the following:

(i) a significant adverse impact upon endangered species, threatened species, or species of concern, as defined in section 182.2 of this title; or

(ii) a significant adverse impact upon protected streams and navigable waters as defined in section 608.1 of this title, or tidal wetlands as defined in subdivision 661.4(hh) of this title, or freshwater wetlands as defined in subdivision 663.2(p) of this title or significant fish and wildlife habitat areas as defined in subdivision 602.5(a) of 19 NYCRR; or

(iii) a bioaccumulation of contaminants in flora or fauna to a level that causes, or that materially contributes to, significant adverse ecotoxicological effects in flora or fauna or leads, or materially contributes, to the need to recommend that human consumption be limited; or

(iv) contaminant levels that cause significant adverse acute or chronic effects to fish, shellfish, crustacea, and wildlife; or

(v) a significant adverse impact to the environment due to a fire, spill, explosion, or similar incident or a reaction that generates toxic gases, vapors, fumes, mists, or dusts; or

(vi) a significant adverse impact to public health where the site is near residences, recreational facilities, public buildings or property, school facilities, places of work or worship, or other areas where individuals or water supplies may be present, or the New York State Department of Health has determined that the presence of hazardous waste on a site poses a significantly increased risk to the public health.

(2) The Commissioner may also find that hazardous waste disposed at a site constitutes a significant threat to the environment if, after reviewing the available evidence and considering the factors the Commissioner deems relevant set forth in this subdivision, the Commissioner determines that the hazardous waste disposed at the site or coming from the site results in, or is reasonably foreseeable to result in, significant environmental damage.

(3) In making a finding under this subdivision as to whether a significant threat to the environment exists, the Commissioner may take into account any or all of the following matters, as may be appropriate under the circumstances of the particular situation:

(i) The duration, areal extent, or magnitude of severity of the environmental damage that may result from a release of hazardous waste;

(ii) Type, mobility, toxicity, quantity, bioaccumulation, and persistence of hazardous waste present at the site;

(iii) Manner of disposal of the hazardous waste;

(iv) Nature of soils and bedrock at and near the site;

(v) Groundwater hydrology at and near the site;

(vi) Location, nature, and size of surface waters at and near the site;

(vii) Levels of contaminants in groundwater, surface water, sediments, air, soil vapor and soils at and near the site and areas known to be directly affected or contaminated by waste from the site, including, but not limited to, contravention of: surface water and groundwater quality standards set forth in 6 NYCRR Part 703 and drinking water standards set forth in subpart 5-1 and Part 170 of 10 NYCRR;

(viii) Proximity of the site to residences, recreational facilities, public buildings or property, school facilities, places of work or worship, and other areas where individuals may be present;

(ix) The extent to which hazardous waste and/or hazardous waste constituents have migrated or are reasonably anticipated to migrate from the site;

(x) The proximity of the site to areas of critical environmental concern (as, wetlands or aquifers);

(xi) The potential for wildlife or aquatic life exposure that could cause an increase in morbidity or mortality of same;

(xii) The integrity of the mechanism, if any, that may be containing the hazardous waste to assess the probability of a release of the hazardous waste into the environment; and

(xiii) The climatic and weather conditions at and in the vicinity of the site.

(4) The mere presence of hazardous waste at a site or in the environment is not a sufficient basis for a finding that hazardous waste disposed at a site constitutes a significant threat to the environment.

(5) In making a finding under ECL 27-1313.3.b(ii) that a significant threat to the environment presents an imminent danger of causing irreversible or irreparable environmental damage, the Commissioner must first find that:

(i) the hazardous waste disposed at the site constitutes a significant threat to the environment;

(ii) there is insufficient time within which to start and complete all administrative procedures to establish an identified responsible party's liability to devise and implement a program for the site, and to start and complete all measures necessary to contain, alleviate, or end the threat to life or health or to the environment sought to be averted, including (if the Department, in its discretion, believes it to be cost-effective) the development and implementation of a remedial program; and

(iii) the nature of the significant environmental damage reasonably foreseeable to occur if no action were to be taken to avert a release or further release of hazardous waste into the environment is such, with respect to the component of the environment reasonably foreseeable to be adversely affected, either as to be of long duration; or that the component of the environment reasonably foreseeable to be affected cannot be fully restored to pre-release conditions.

(6) In making a finding under ECL 27-1313.3.b(ii) that a significant threat to the environment is causing irreversible or irreparable environmental damage, the Commissioner must first find that:

(i) significant environmental damage has occurred; and

(ii) the nature of that environmental damage is such, with respect to the component of the environment adversely affected, either as to be of long duration; or that the component of the environment affected cannot be fully restored to pre-release conditions.

(7) In making a finding ECL 27-1313.3.b(iii) that the significant threat to the environment posed by hazardous waste disposed at a site makes it prejudicial to the public interest to delay action until a proceeding can be held set forth in ECL article 27, title 13, the Commissioner must determine either that further environmental damage reasonably is anticipated to result during such a hearing; or that, if environmental damage has not yet occurred, such reasonably is anticipated to occur during the pendency of the proceeding.

(b) Site classification.

(1) The Department shall maintain and make available for public inspection a registry of inactive hazardous waste disposal sites, in accordance with ECL 27-1305.

(2) The Registry maintained by the Department must include all sites, except as provided in subdivision (c) below, known to the Department at which hazardous waste, as defined in subdivision 375-1.2(x) has been confirmed to have been disposed in an amount that:

(i) presently constitutes a significant threat to the environment, as described in subdivision 375-2.7(a); or

(ii) is reasonably foreseeable to constitute a significant threat to the environment.

(3) The Department will, based upon the information available, classify sites according to the following criteria:

(i) a class “1” site is one at which:

*(a)* hazardous waste constitutes a significant threat to public health and/or the environment; and

*(b)* the significant threat to public health and/or the environment is causing, or presents an imminent danger of causing, either irreversible or irreparable damage to the environment;

(ii) a class "2" site is one at which hazardous waste constitutes a significant threat to public health and/or the environment, as described in subdivision 375-2.7(a);

(iii) a class "3" site is one at which hazardous wastedoes not presently, constitute a significant threat to public health and/or the environment, as described in subdivision 375-2.7(a);

(iv) a class "4" site is one that has been properly closed but that requires continued site management, consisting of operation, maintenance, and/or monitoring;

(v) a class "5" site is one that has been properly closed and requires no further action.

(4) The Department will investigate such areas or structures which it has reason to believe may need to be included in the Registry and may establish an administrative category for such areas or structures.

(5) The Registry is informational in nature, and a site is not required to be on the Registry to confer jurisdiction for action by the Department according to statute or its implementing regulations.

(6) When final decisions concerning an initial site listing or classification are made, the Department shall provide notice:

(i) to the owner of the site or an area of the site by certified mail, 15 days prior to public noticing such listing decision; and

(ii) to the site contact list, in a timely manner, after the listing decision is complete or, if a site contact list has not been developed, by publication in a local newspaper, as well as notice to the chief executive officer of the city, town or village and the public water supplier.

(7) Any person may provide to the Department, and the Department shall consider, information relevant to a site listed in the Registry or to an area or structure which may need to be included in the Registry.

(8) In classifying the site, the Department may:

(i) disregard any amelioration of conditions at such site accomplished by the interim remedial measure unless the interim remedial measure achieves the goal of the remedial program for such site as described in subdivisions 375-2.8(a) and (b); and

(ii) base its determination upon facts and circumstances known to the Department to have existed at any time since the date upon which such site was first listed in the Registry that demonstrate the highest relative priority of the need for action at such site; and

(9) The Registry may be updated by adding, deleting or reclassifying sites at any time, in accordance with this section.

(c) Site classification deferral.

(1) The Department will defer the assessment or reassessment of sites for inclusion on the Registry which are the subject of negotiations for, or implementation of:

(i) a brownfield site cleanup agreement set forth in ECL article 27 title 14; or

(ii) a State assistance contract for an environmental restoration project..

(2) The deferral will continue for so long as the remedial party is in compliance with the terms of such agreement or State assistance contract.

(3) The Department shall assess or reassess such site upon termination of the agreement or State assistance contract.

(d) Site reclassification or modification.

(1) The Department may review the classification of any site on the Registry at any time, but must review the classification of each site on the Registry at least annually not later than March 31 of each year.

(2) Based upon new information regarding the nature and extent of contamination, the site description in the Registry will be revised by the Department as appropriate. Included in the site description are land use, acreage, and contaminants disposed.

(3) Notification of the reclassification of a site will be provided in accordance with paragraph 375-2.7(b)(6).

(e) Site delisting.

(1) The Department will not delete any site from the Registry without providing, at least 60 days prior to the proposed delisting, written notice to

(i) the owner or operator of the site;

(ii) the public by publication of a notice in the Environmental Notice Bulletin and newspaper of general circulation in the county in which the site is located; and

(iii) the site contact list. If a site contact list has not been developed, the Department will provide notice in accordance with paragraph 375-2.7(b)(6);

(2) The Department shall provide an opportunity for submittal of written comments on the proposed delisting, of at least 30 days, and may provide an opportunity to provide oral comments at a public meeting;

(3) The Department shall make publically available a summary of any comments received; and

(4) The Department may delist a site if the site characterization or remedial investigation does not confirm the disposal of hazardous waste in an amount that presently constitutes a significant threat to the environment, or is reasonably foreseeable to ever constitute a significant threat to the environment.

(f) Petitions.

(1) The only person who has standing to make a petition is:

(i) a current owner; or

(ii) a responsible party by virtue of being the current operator, or former owner or operator, of a site.

(2) Only the following relief may be sought by a petition:

(i) the deletion of a site from the Registry;

(ii) the reclassification of a site to a different class on the Registry; or

(iii) the modification of any information concerning a site on the Registry.

(3) The Department will act only upon a complete petition.

(i) To be complete, a petition must be submitted by a person identified in paragraph 375-2.7(f)(1) and must seek only relief identified in paragraph 375-2.7(f)(2) upon the basis of material factual allegations supported by proof that tends to establish the right to the relief sought.

(ii) If the relief being sought is identified in paragraph 375-2.7(f)(2)(i) or (ii), the proof must be in the form of an affidavit made by a person having direct knowledge of, or who is an expert with regard to, the subject of the matters covered by the petition.

(4) A petition is a written instrument that will be filed with and become a part of the Department's records.

(5) After receipt of a complete petition, the Department shall:

(i) Not later than fifteen calendar days after receipt, publish notice thereof in the Environmental Notice Bulletin, including a deadline not less than fifteen nor more than twenty-one calendar days after the date of publication for submission of written comments on the petition including any request for an administrative hearing; and

(ii) Not later than forty-five calendar days after receipt of a complete petition, the Department shall either:

*(a)* determine to decide the petition summarily; in such case, the Department will proceed to decide the petition, and provide its decision to the petitioner not later than thirty calendar days after such determination; or

*(b)* if a significant degree of public interest exists, determine that the petition should not be decided summarily and that an administrative hearing should be convened on a date not more than ninety calendar days after receipt of a complete petition; in such case, not sooner than thirty calendar days before such hearing, the Department shall notify the petitioner and all other persons known by the Department to be proper petitioners of the Department's intent to convene such hearing, publish notice thereof in the Environmental Notice Bulletin, and require the petitioner to publish notice thereof at the petitioner's expense in a newspaper of general circulation in the county in which the site is located. The burden of proof in such hearing shall be on the petitioner. Upon the conclusion of such hearing, the Department will decide the petition, and provide its decision to the petitioner not later than thirty calendar days after the conclusion.

(6) The Department shall comply with the provisions under subdivisions375-2.7 (b) or (c) prior to changing the site classification or listing.

**375-2.8 Remedial program.**

(a) The goal of the remedial program for a specific site is to restore that site to pre-disposal conditions, to the extent feasible. At a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment presented by hazardous waste disposed at the site through the proper application of scientific and engineering principles and in a manner not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan published set forth in section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended as by the Superfund Amendments and Reauthorization Act of 1986.

(b) Interim remedial measures. In the case of a site at which an interim remedial measure has been implemented, the Department may assert, based on site-specific circumstances including post-implementation investigation and/or monitoring, that the interim remedial measure satisfies the goal of the remedial program for the site, where only continued implementation of site maintenance associated with the IRM or institutional controls are required, in which event the Department will propose the no-further-action alternative. Provided no other operable units remain for the site requiring action, the Department may then reclassify or delist the site according to subdivision 375-2.7 (d) or (e).

(c) The process of selecting a remedy shall be documented in a record of decision, which will consist of the following:

(1) The location and a description of the site;
(2) A history of the operation of the site;
(3) The current environmental and public health status of the site;
(4) An enforcement history and current status of the site;
(5) The specific goals and objectives of the remedy selected for the site;
(6) A description and evaluation of the alternatives considered, except in the case of no further action remedies;
(7) A summary of the basis for the Department's decision;
(8) A list of the documents the Department used in its decision making; and
(9) A responsiveness summary.

**375-2.9 Certificate of completion.**

(a) Upon receipt of the certificate of completion and subject to subdivsion (b), the parties named on such certificate shall not be liable to the Department upon any statutory or common law cause of action, except for one

for natural resource damages, arising out of the presence of any hazardous waste in, on or emanating from the site that was the subject of such certificate.

(b) The certificate of completion does not extend to, nor limit, the State's rights concerning any further investigation and/or remediation the Department deems necessary due to:

(1) Environmental contamination at, on, under, or migrating from the site if, in light of such conditions, the site is no longer protective of public health or the environment;

(2) Non-compliance with the terms of the order or state assistance contract, the remedial work plan or the certificate of completion;

(3) Fraud committed by the certificate holder;

(4) A finding by the Department that a change in an environmental standard, factor, or criteria upon which the remedial work plan was based renders the remedial program implemented at the site no longer protective of public health or the environment; or

(5) A change in the site`s use subsequent to the Department`s issuance of the certificate of completion, unless additional remediation is undertaken which shall meet the standard for protection of the public health and environment that applies to this subpart.

(c) The liability protections set forth in this section shall extend to successors or assigns through acquisition of title to the site to which the certificate applies and to a person who develops or otherwise occupies the site; provided that such persons act with due care and in good faith to adhere to the requirements of the site work plans, site management plan and certificate of completion. However, such liability protections do not extend to, and cannot be transferred, to a responsible party as of the effective date of the certification of completion, unless that person was party to the order for the site on which such certificate was issued.

(d) Liability limitation reopener provisions.

(1) The certificate of completion may be modified or revoked upon a finding by the Department that either:

(i) one or more of the circumstances set forth at paragraph 375-1.9(e)(1) have been met; or

(ii) one or more of the circumstances set forth at subparagraph (b) have been met.

(2) Upon such a finding, notice shall be provided to the certificate holder as set forth in section 375-1.9.

(3) The certificate holder shall have 30 days, from the effective date of the notice, within which to cure the deficiency or seek dispute resolution. If the certificate holder or current title owner does not cure the deficiency or seek dispute resolution within such 30 day period, the certificate of completion shall be deemed modified or vacated on the 31st day after the effective date of the Department's notice.

(e) Nothing in this section shall be construed to affect either the liability of any person with respect to any costs, damages, or investigative or remedial activities that are not included in the order or remedial investigation work plan and/or remedial work plan for the site or the Department`s authority to maintain an action or proceeding against any person who is not subject to the order or remedial work plan.

(f) Nothing in this section shall be construed to affect the authority of the Department to reach settlement with other persons consistent with its authority under applicable law.

(g) Upon issuance of the certificate of completion, the Department will initiate Registry reclassification or delisting.

**375-2.10 Citizen participation.**

(a) The Department will require that opportunities for public involvement be included in the development and implementation of an inactive hazardous waste disposal site remedial program, as set forth in this

subdivision and section 375-1.10.

(b) This section applies to all inactive hazardous waste disposal site remedial programs, whether implemented by the Department or by a remedial party.

(c) The Department will communicate with and solicit the views of all interested parties. To accomplish this, at the appropriate time, the Department will, at a minimum:

(1) Mail to those on the site contact list a notice and brief analysis of the proposed remedy, which includes sufficient information to provide a reasonable explanation of that proposed remedy, including but not limited to, a summary of the Department's reasons for preferring it over other alternatives considered and the construction and site management requirements of the proposed remedy;

(2) Provide a 30 day period for submission of written comments and an opportunity for submission of oral comments at a public meeting on the proposed remedy near the site on the proposed remedy; and

(3) Summarize the comments received at the public meeting and during the comment period and make the summary available to the public upon issuance of the record of decision;

(d) The Department may require the mailing of additional notices and/or fact sheets to those on the site contact list.

(e) All final documents developed for the remedial program will be made available in the document repository.

(f) The Department or a remedial party implementing an interim remedial measure will conduct such citizen participation activities as the Department deems necessary and appropriate under the circumstances.

(g) Technical assistance grants may be made to qualifying community groups for inactive hazardous waste disposal sites classified as Class 1 or Class 2 on the Registry.

(1) Grants may be used:

(i) to obtain technical assistance in interpreting information with regard to the nature of the hazard posed by contaminants located at or emanating from a qualifying site;

(ii) to hire health and safety experts to advise affected residents on any health assessments; or

(iii) for the training and education of interested affected community members to enable them to more effectively participate in the remedy selection process.

(2) Grants may not be used for the purposes of:

(i) collecting field sampling data;

(ii) political activity; or

(iii) lobbying legislative bodies.

(3) Qualifying community groups. A community group must meet the following criteria to be eligible:

(i) be either a domestic not-for-profit corporation as defined at NPCL 102.a(5) or an authorized foreign not-for-profit corporation as defined at NPCL 102.a(7);

(ii) be exempt from taxation under section 501(c)(3) of the internal revenue code. In determining this criterion, the Department may consider any evidence which could be considered by a court pursuant to CPLR 3211(a)(11);

(iii) be affected by a remedial program for such site;

(iv) not be sustained by or controlled by or affiliated with any person that is responsible for such site according to applicable principles of statutory or common law liability; and

(v) demonstrate that its membership resides in the community and represents the interests of the community affected by such site. In determining this criterion, the Department may consider any evidence that its members' health, economic well-being or enjoyment of the environment are potentially affected by such site.

(4) Grant Amounts. The total amount of all technical assistance grants awarded for a particular class 1 or 2 inactive hazardous waste disposal site is limited to $50,000. The amount of each technical assistance grant:

(i) will be determined by the Department based upon the scope of work in the application; and

(ii) the grant recipient may request increases to its grant, up to the maximum $50,000 per site. The request should be in writing and include appropriate justification and a budget.

(5) Grant applications. A community group desiring to obtain a grant shall submit an application to the Department in such form and manner, and containing such information as the Department may require. A complete application consists of:

(i) a completed application form containing such information as the Department may prescribe; and

(ii) a certification by a responsible officer of the corporation, in a form provided by the Department, which certifies at a minimum that:

*(a)* the corporation is not sustained by or controlled by or affiliated with any person that is responsible for the site according to applicable principles of statutory or common law liability;

*(b)* all statements made for the purpose of obtaining a grant either are set out in full on this application or are set out in full in exhibits attached to this application and incorporated herein by reference;

*(c)* all information included in this application, including attachments, is accurate to the best of his/her knowledge;

*(d)* that the undersigned is authorized to execute this application for the corporation; and

*(e)* acknowledges that a false statement made in the certification is punishable as a class "A" misdemeanor pursuant to section 210.45 of the Penal Law.

(6) A technical assistance grant shall be made by the Department pursuant to a State assistance contract between the Department and the grant recipient as set forth in subdivision 375-2.5(c). All such grants are recoverable State costs subject to recovery from responsible parties.

(7) The Department may require a responsible party to provide a technical assistance grant directly to a qualifying community group. Such responsible party shall provide for a grant consistent with the requirements of this subdivision within a time frame directed by the Department.

**375-2.11 Miscellaneous.**

(a) Prohibitions.

(1) Except in the event of an emergency, in which event the remedial party shall comply with 375-1.5(b)(1), no person shall undertake at a site listed in the Registry any physical alteration that constitutes storage, treatment, or disposal of any hazardous waste which served as the basis for such listing, unless:

(i) Such conduct is exempted under 6 NYCRR Part 373-1.1(d); or

(ii) Such conduct is done with the express written approval of the Department granted either by order or in such other manner as the Commissioner shall direct;

(2) No person to whom a request has been made pursuant to ECL 27-1307.1 shall fail to comply therewith.

(3) No person to whom a request has been made pursuant to ECL 27-1309.1 shall fail to comply therewith.

(4) No person to whom an order has been issued pursuant to ECL 27-1313.3 shall fail to comply

therewith.

(b) State Environmental Quality Review Act applicability. Remedy selection and implementation of remedial actions under Department approved work plans pursuant to Titles 13 of Article 27 of the ECL are not subject to review pursuant to Article 8 of the ECL and its implementing regulations (6 NYCRR Part 617), as an exempt action pursuant to the enforcement exemption provision.

(c) State funding: hazardous waste remedial fund.

(1) The Department may expend moneys of the hazardous waste remedial fund provided for at section 97-b of the SFL for the following purposes:

(i) To pay, in whole or in part, the Department's costs and expenses incurred in the development and implementation of a remedial program under the following circumstances :

*(a)* when a person responsible for a site, having been ordered to do so under section 375-2.1 of this Part, has failed to comply with such order;

*(b)* when a person responsible for a site cannot be identified or located;

*(c)* when circumstances exist that substantiate the making either the findings of the Commissioner set forth at ECL 37-1313.3.b, or the findings of the Commissioner of Health set forth in section 1389-b.3.b of the Public Health Law but only to the extent necessary to address those circumstances unless the Department, in the exercise of discretion, determines that it would be cost-effective to develop and implement the complete program;

*(d)* when the Department; after making all reasonable efforts to secure voluntary agreement, as documented by the findings of the Commissioner set forth at section 97-b.4 of the SFL; has not secured a voluntary agreement by the owner, operator or other responsible person for a site. For purposes of this section, the phrase "all reasonable efforts to secure voluntary agreement" means the diligent conduct of a search to identify responsible parties by a method or methods appropriate to the circumstances of the particular site (including, but not limited to, reviews of real property records, regulatory files of appropriate government agencies, publicly available financial information, and private business records obtained under ECL 27-0915, 27-1307, and/or 27-1309); and the selection of the owner or operator or other person responsible for a site that the Department determines to be an appropriate party with which to negotiate; and diligent conduct of negotiations with that responsible party. Negotiations have been conducted diligently with a particular responsible party when the Department informs that party of the Department's intention to negotiate an order on consent with that party the objective of which is to commit that party to the development and/or implementation of a program, and that party

*(1)* does not respond to the Department's notification;

*(2)* responds to the Department's notification by refusing to negotiate;

*(3)* starts negotiations and thereafter discontinues same;

*(4)* starts negotiations and does not enter into a consent order authorized by subdivision 375-1.2(a) to undertake the objective of the negotiations within the time frame established by the Department's notification which time frame shall be not later than 6 months after the commencement of negotiations; or

*(5)* demonstrates to the Department's satisfaction that it is unable to pay for the objective of the negotiation.

(ii) To pay for the cleanup or restoration to its original state of any area where hazardous wastes were disposed of or possessed unlawfully contrary to ECL 27-0914.

(iii) To pay for site identification, classification, and investigation activities, including but not limited to, testing, analyses, and record searches, and the Department's related administrative activities.

(iv) To pay for all other activities to develop and regularly update the plan required by ECL 27-1305.5 and 27-1305.6.

(v) To pay for response actions to clean up spills of hazardous waste or to abate other public health or environmental hazards caused by hazardous waste, except those provided for under the New York State Environmental Protection and Spill Compensation Fund, when an emergency exists as documented by the findings of the Commissioner in such form as the Commissioner may prescribe.

(2) The Department must attempt to recover all costs and expenses incurred by the State associated with a site that are attributable to the identification thereof as a site and to the program pertaining to such site.

# Subpart 375-3
# Brownfield Cleanup Program

Part 375-3 deleted new language follows

**375-3.1 Purpose; applicability; construction.**

This subpart applies to the development and implementation of remedial programs for brownfield sites. This subpart addresses requirements in addition to those requirements identified in subpart 375-1.

**375-3.2 Definitions.**

As used in this subpart, the following terms have the following meanings:

(a) "Alternatives analysis" means a study undertaken to develop and evaluate options for remedial action, emphasizing data analysis.

(b) "Applicant" means a person whose request to participate in the brownfield cleanup program has been accepted by the Department:

(1) "Participant" means an applicant who either:

(i) was the owner of the site at the time of the disposal or discharge of contaminants; or

(ii) is otherwise a person responsible according to applicable principles of statutory or common law liability, unless such person`s liability arises solely as a result of such person`s ownership or operation of or involvement with the site subsequent to the disposal or discharge of contaminants.

(2) "Volunteer" means an applicant other than a participant, including without limitation a person whose liability arises solely as a result of such person`s ownership or operation of or involvement with the site subsequent to the disposal or discharge of contaminants, provided however, such person exercises appropriate care with respect to contamination found at the facility by taking reasonable steps to:

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released contaminant.

(c) "Brownfield site cleanup agreement" means an agreement executed in accordance with ECL 27-1409 by an applicant and the Department for the purpose of completing a brownfield site remedial program.

(d) "Change of use" means the transfer of title to all or part of such brownfield site, the erection of any structure on such site, the creation of a park or other public or private recreational facility on such site, or any activity that is likely to disrupt or expose contamination or to increase direct human exposure; or any other conduct that will or may tend to significantly interfere with an ongoing or completed remedial program at such site and the continued ability to implement the engineering and institutional controls associated with such site.

(e) "Permanent cleanup" or "permanent remedy" means a cleanup or remedy that would allow a site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls.

(f) "Requestor" means a person who has submitted an application to participate in the brownfield cleanup program whose eligibility has not yet been determined by the Department.

**375-3.3 Eligibility.**

(a) Eligible sites. Any real property that meets the definition of a "brownfield site" as defined at ECL 27-1405.2 and ECL 27-1407.8a.

(1) The definition of brownfield site has two elements:

(i) there must be confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and

(ii) there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development, use or re-use of the property.

(2) In determining eligibility, the Department may:

(i) determine that only a portion of any proposed site meets the statutory definition of

"brownfield site," and may approve only a portion of a site for participation in the brownfield cleanup program;

(ii) require performance of a Phase 2 study, in accordance with ASTM 1527-00; or

(iii) consider only that contamination from a source or sources located on the brownfield site.

(b) Ineligible sites. Any real property, which is:

(1) on the Registry as class 1 or class 2;

(2) listed on the national priorities list established under the authority of 42 U.S.C. Section 9605; or

(3) the subject of an ongoing enforcement action pursuant to ECL Article 27, Title 7 or Title 9 involving solid or hazardous waste;

(4) subject to an order for cleanup under NL Article 12 ("Oil Spill Prevention, Control, and Compensation") or ECL Article 17 Title 10 ("Control of the Bulk Storage of Petroleum") except such property shall not be deemed ineligible if it is subject to a stipulation agreement; or

(5) subject to any other on-going state or federal environmental enforcement action related to contamination at or emanating from the site.

(c) Ineligible parties. A person is ineligible for participation in the brownfield cleanup program if subject to:

(1) A pending action or proceeding relating to the proposed brownfield site in any civil or criminal court in any jurisdiction, or before any state or federal administrative agency or body, wherein the state or federal government seeks the investigation, removal, or remediation of contamination or penalties;

(2) An order providing for the investigation, removal, or remediation of contamination relating to the proposed brownfield site; or

(3) An outstanding claim for cleanup and removal costs under Article 12 of the Navigation Law; related to the site for which participation is sought.

(d) Public interest consideration. The Department may reject a request to participate in the Brownfield Cleanup Program, even if the real property meets the definition of "brownfield site," upon a determination that the public interest would not be served by granting such request. In making this determination, the Department must consider but is not limited to, the statutory criteria set forth in ECL 27-1407.8.

**375-3.4 Applications.**

(a) Application contents.

(1) Applications to participate in the brownfield cleanup program shall be submitted to the Department in such form and manner, and containing such information as the Department may require.

(2) Applications, including attachments, must be submitted both in hard copy and electronically.

(b) Complete applications.

(1) An application will be deemed complete when the Department determines that it contains sufficient information to allow the Department to determine eligibility and the current, intended and reasonably anticipated future land use of the site.

(2) The Department shall use its best efforts to determine within in 10 days after the receipt of an application whether the application is complete and send a letter to the requestor advising that the application is either:

(i) complete; or

(ii) incomplete, specifying the information that must be submitted or supplemented to make the application complete.

(3) If the Department determines that an application is incomplete, the Department may return the application.

(c) Application approval. The Department shall use its best efforts to expeditiously notify the requestor within 45 days after receipt of a complete application whether such request is accepted or rejected.

**375-3.5 Brownfield site cleanup agreements.**

(a) In addition to such further terms and conditions as the Department may require in the brownfield cleanup agreement, the brownfield cleanup agreement shall be deemed to include, and the applicant shall comply with, all of the provisions set forth in subdivision 375-1.5(b) and the following:

(1) Indemnification. Unless otherwise approved by the Department, a remedial party shall indemnify and hold the State, the Trustee of the State's Natural Resources, and their representatives and employees harmless from any claim, suit, action, and cost of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the remedial program except for those claims, suits, actions, and costs arising from the gross negligence or willful or intentional misconduct by the State of New York, and/or its representatives and employees during the course of any activities conducted pursuant to the remedial program. The Department shall provide written notice no less than 30 days prior to commencing a lawsuit seeking indemnification.

(b) Termination of the agreement by the applicant. The applicant may terminate a brownfield site cleanup agreement at any time and for any reason, provided that:

(1) The applicant provides written notice to the Department at least 15 days in advance of the termination;

(2) Termination does not pose an immediate threat to public health and/or the environment; and

(3) The applicant leaves the site in no worse condition, from an environmental and public health perspective, than before it entered into the brownfield site cleanup agreement.

(c) Termination of the agreement by the Department. The Department may terminate the brownfield site cleanup agreement for cause, including but not limited to, if the applicant fails to substantially comply with the agreement's terms and conditions. Prior to termination of an agreement by the Department, the Department shall:

(1) Notify the applicant in writing of its intention to terminate the agreement and the reasons for the intended termination;

(2) Provide the applicant with a reasonable opportunity of not less than 30 days to correct deficiencies; and

(3) Notify the applicant, after such 30 day period, in writing of its decision relative to termination of the agreement. Any notice of termination shall state the reasons for the termination.

(d) Termination by either the applicant or the Department does not affect the applicant's obligations to pay State costs and provide indemnification pursuant to subdivision 375-1.5(b) until and including the date of termination and the applicant must ensure that the site is in no worse condition, from an environmental or public health perspective, than before it entered into the brownfield site cleanup agreement.

**375-3.6 Reserved.**

**375-3.7 Significant threat and Registry determinations.**

(a) Significant threat.

(1) No later than 20 days after approval of the remedial investigation report, the Department shall determine if the site constitutes a significant threat to public health or the environment.

(2) In evaluating whether the presence of contamination at a site constitutes a significant threat requiring listing of the site on the Registry, the Department shall consider the criteria outlined in subdivision 375-2.7(a). In considering the criteria, the Department shall evaluate the threat posed by both hazardous waste and petroleum at the site.

(3) Notice of the Department's determination shall be published by the applicant, as a fact sheet

issued to the site contact list in accordance with section 375-3.6. Sites that have been determined by the Department to constitute a significant threat:

(i) may be the subject of a technical assistance grant in accordance with subdivision 375-3.10(c);

(ii) must be remediated pursuant to a remedy selected by the Department from a Department-approved alternatives analysis prepared by the applicant.

(b) Registry determinations. The Department will defer its assessment or reassessment of a brownfield site's classification in the Registry in accordance with subdivision 375-2.7(c). The Department shall assess or reassess such site upon termination of the brownfield site cleanup agreement.

**375-3.8 Remedial program.**

(a) The goal of the remedial program is to select and implement a remedy which shall be fully protective of public health and/or the environment including, but not limited to, groundwater according to its classification pursuant to ECL 17-0301, drinking water, surface water and air (including indoor air), sensitive populations, including children and ecological resources, including fish and wildlife. In addition, a remedy will be selected upon consideration of the following:

(1) A remedial program that achieves a permanent cleanup of a contaminated site, including the restoration of groundwater to its classified use, is to be preferred over a remedial program that does not do so;

(2) The selection of a remedy will take into account the current, intended, and reasonably anticipated future land uses of the site and its surroundings; and

(3) The risk presented by residual contamination as defined at ECL 27-1405.28 at a site shall not exceed an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer end points, except:

(i) for remedies developed in accordance with paragraph 375-3.8(e)(4) with a cleanup level which exceeds the parameters in paragraph (3) above, the Applicant must demonstrate that such level would be protective of public health and/or the environment. This demonstration must be included in the alternatives analysis developed in accordance with subdivision 375-3.8(f); and

(ii) a cleanup level which exceeds the parameters in paragraph (3) above, may be approved by the Department under paragraph 375-3.8(e)(4), without requiring the use of institutional or engineering controls to eliminate exposure only upon a site-specific finding by the Commissioner, in consultation with the State Commissioner of Health, that such level shall be protective of public health and environment.

(b) Scope of investigation. Remedial investigations and final investigation reports must be completed in accordance with ECL 27-1411.1 and 27-1415.2 and this title.

(1) Applicants must fully characterize the nature and extent of contamination onsite and must perform a qualitative exposure assessment, based on this characterization, in accordance with ECL 1415.2(b) for the site and for contamination that has migrated from the site.

(2) Participants also must fully characterize the nature and extent of contamination onsite as well as the nature and extent of contamination that has migrated from the site.

(3) The final remedial investigation report must demonstrate whether conditions at the site meet the requirements of paragraph 375-3.8(e)(1) without remediation.

(4) Where the paragraph 375-3.8(e)(1) requirements have not been achieved, any determination that the requirements of the brownfield cleanup program have been met without the need for remediation must be supported by an alternatives analysis.

(c) Remedy selection.

(1) Applicants must, based upon the characterization of the nature and extent of contamination onsite and qualitative exposure assessment, select or propose a remedy for the contamination present on the site and

address further contaminant migration from the site.

(2) Participants must also, based upon the characterization of the nature and extent of contamination that has migrated from the site, propose or select a remedy which addresses this off-site contamination.

(3) The Department will select, or approve, a remedy for a site after consideration of an alternatives analysis presented in a site specific remedial work plan.

(d) Off-site source of contamination. The remedy selected for a site must eliminate or mitigate to the extent feasible, recontamination of the site from any off-site source. The Department may require remedial action to prevent or minimize the impact of any off-site contamination on the site.

(e) Cleanup tracks. For sites or portions of sites where the Department has determined that remediation is needed to meet the remedial program requirements, each remedial alternative that is developed and evaluated shall conform to the requirements of one of the following cleanup tracks:

(1) Track 1: Unrestricted use.

(i) the remedial program for Track 1 shall achieve a cleanup level that will allow the site to be used for any purpose without:

*(a)* any restrictions on the use of the site (e.g. residential, commercial or industrial); or

*(b)* the reliance on the long-term employment of institutional or engineering controls, except as provided in subparagraph (iii).

(ii) the remedial program for soils at sites being remediated under Track 1 must achieve the applicable contaminant-specific soil cleanup objectives for the protection of public health set forth in Table 375-3.8(a), unless ecological resources are determined by the Department to be present, in which event the applicable contaminant-specific soil cleanup objectives for protection of ecological resources shall be employed, if lower than the public heath objective.

(iii) the long-term employment of institutional or engineering controls is not allowed in Track 1, except to address groundwater where the applicant:

*(a)* is a volunteer;

*(b)* has met the contaminant-specific soil cleanup objectives for soil given in Table:375-3.8(a); and

*(c)* has demonstrated to the Department's satisfaction that there has been a bulk reduction in groundwater contamination to asymptotic levels.

(iv) the short-term employment of an institutional or engineering controls is allowed where the remedial program for the site:

*(a)* includes an active treatment system, either ex-situ or in-situ, which will operate for, or require, no more than 5 years to meet the remedial goals;

*(b)* requires the institutional control to assure the operation and integrity of the remedy, as well as to address potential human health exposures during this period; and

(*c)* includes a provision for the applicant to implement an alternative remedy to meet the soil cleanup objectives, if the short-term institutional period is exceeded.

(v) the Department may direct an applicant to develop a contaminant-specific soil cleanup objective for contaminant(s) not included in Table 375-3.8(a), which soil cleanup objective shall be developed utilizing the same methodologies that were used by the Department to develop Table 375-3.8(a). The specific methodologies to be utilized are provided in the 'New York State Brownfield Cleanup Program Development of Soil Cleanup Objectives Technical Support Document' dated August 12, 2005 (Technical Support Document). In developing soil cleanup objectives in Track 1 for the protection of:

*(a)* public health, the Track 1 protection of public health soil cleanup objective

for the contaminant will be the lowest of the calculated values:

(*1*) for groundwater protection; and

(*2*) the five public health exposure pathways (i.e.: soil ingestion, dermal contact, vegetable ingestion, particulate inhalation and volatile inhalation); and

*(b)* ecological resources, which is calculated as detailed in the Technical Support Document.

(2) Track 2: Restricted use with generic soil cleanup objectives.

(i) the remedial program for Track 2:

*(a)* may include restrictions on the use of the site (i.e. residential, commercial or industrial); or

(*b*) may include reliance on the long-term employment of institutional and/or engineering controls to address groundwater;

*(c)* may not include reliance on the long-term employment of institutional and/or engineering controls to achieve the appropriate contaminant-specific soil cleanup objectives for soil set forth in Table 375-3.8(b);

*(d)* may include the short-term employment of an institutional or engineering controls where the remedial program for the site:

*(1)* includes an active treatment system , either ex-situ or in-situ, which will operate for, or require, no more than 5 years to meet the remedial goals;

*(2)* requires the short term institutional control to assure the operation and integrity of the remedy, as well as to address potential human health exposures during this period; and

(*3*) includes provision for the applicant to implement an alternative remedy to meet the soil cleanup objectives, if the short-term institutional period is exceeded.

(ii) the remedial program for soils must achieve the applicable contaminant-specific soil cleanup objectives for the protection of public health set forth in Table 375-3.8(b), unless groundwater standards are being contravened or the Department has determined that ecological resources are present at the site, in which event the applicant must achieve the lower of the applicable objectives:

*(a)* where groundwater standards are being contravened, the soil cleanup objective representing the protection of groundwater is applicable unless

*(1)* the source has been addressed , as set forth in subdivision 375-1.8(c);

*(2)* a groundwater restriction is employed;

*(3)* there is no off-site migration of contaminated groundwater; or

*(4)* a groundwater remedy is in place to control or treat any off-site migration of contaminated groundwater; or

*(b)* where the Department has determined ecological resources are present, the ecological soil cleanup objective.

(iii) the contaminant-specific soil cleanup objectives provided in Table 375-3.8(b) are not applicable to soils at depths greater than 15 feet below the surface of the site, provided that:

*(a)* the soils do not meet the definition of a source;

*(b)* the environmental easement for the site requires that any contaminated soils remaining at greater than 15 feet below the surface of the site will be managed along with other site soils, pursuant to a site management plan;

*(c)* off-site groundwater is not impacted, where soil concentrations exceed the protection of groundwater contaminant specific soil cleanup objectives; and

*(d)* on-site groundwater use is restricted.

(vi) for purposes of determining the appropriate land use category, the applicant will consider the nature of the development and the activities which are occurring, or may occur at the site:

*(a)* on the ground level of any structure;

*(b)* on the surrounding land; or

*(c)* in the subsurface to a depth of 15 feet below the surface of the site.

(v) the Department may direct an applicant to develop a contaminant-specific soil cleanup objective for contaminant(s) not included in Table 375-3.8(b), as set forth in subparagraph 375-3.8(e)(1)(v).

(3) Track 3: Restricted use with modified soil cleanup objectives.

(i) The remedial program for Track 3 is the same as the Track 2 remedial program, as provided in paragraph 375-3.8(e)(2), except the soil cleanup objectives set forth at Table 375-3.8(b) may be modified based upon site-specific data.

(ii) The remedial program for Track 3 shall achieve the contaminant-specific soil cleanup objectives set forth at Table 375-3.8(b), unless the Department approves soil cleanup objectives which are modified by site specific data consistent with the following:

(iii) For the calculation of a Track 3 groundwater or ecological resources soil cleanup objectives, site-specific total organic carbon in the soil at a site may be substituted in the algorithms provided in the Technical Support Document.

(iv) For the calculation of a Track 3 public health soil cleanup objective, site-specific data may be used to modify only two of the five exposure pathways:

*(a)* for the particulate inhalation pathway six parameters rely on site-specific data; and

*(b)* for the volatile inhalation pathway, four parameters rely on site-specific data.

(v) The algorithms to be used for each pathway and details on the parameters which can be substituted are included in the Technical Support Document.

(4) Track 4: Restricted use with site-specific soil cleanup objectives.

(i) The remedial program for Track 4 shall achieve a cleanup level that will be protective of public health and the environment:

*(a)* for the site's current, intended or reasonably anticipated residential, commercial, or industrial use; and

*(b)* will rely upon the long-term employment of institutional or engineering controls to achieve such level.

(ii) cleanup objectives for soils under Track 4 must be approved by the Department.

(iii) The long-term employment of institutional or engineering controls is allowed: to restrict:

*(a)* the use of the site (i.e.: residential, commercial, industrial);

*(b)* groundwater use in order to meet the remedial goals for the site; and

*(c)* exposure to soil in order to meet the remedial goals for the site.

(iv) Exposed surface soils must be addressed for Track 4 cleanups, as follows, where the intended use is :

*(a)* residential, the top two feet of all exposed surface soils which exceed the site background values for contaminants of concern and are not otherwise covered by the components of the development of the site (e.g. buildings, pavements), shall not exceed the applicable contaminant-specific soil cleanup objectives set forth in Table 375-3.8 (b) for restricted-residential use;

*(b)* commercial, the top one foot of all exposed surface soils which exceed the site background values for contaminants of concern and are not otherwise covered by the components of the

development of the site (e.g. buildings, pavements), shall not exceed the applicable contaminant-specific soil cleanup objectives for soil set forth in Table 375-3.8 (b) for restricted-commercial use; and

*(c)* industrial, the top one foot of all exposed surface soils which exceed the site background values for contaminants of concern and are not otherwise covered by the components of the development of the site (e.g. buildings, pavements), shall not exceed the applicable contaminant-specific soil cleanup objectives for soil set forth in Table 375-3.8(b) for restricted-industrial use.

Table 375-3.8(a)
Track 1 - Unrestricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | Protection of Ecological Resources |
|---|---|---|---|
| **Metals** | | | |
| Arsenic | 7440-38-2 | 16[c] | 13[c] |
| Barium | 7440-39-3 | 350[c] | 433 |
| Beryllium | 7440-41-7 | 14 | 10 |
| Cadmium | 7440-43-9 | 2.5[c] | 4 |
| Chromium, hexavalent | 18540-29-9 | 19 | 0.4 |
| Chromium, trivalent | 16065-83-1 | 36 | 41 |
| Copper | 7440-50-8 | 270 | 50 |
| Cyanide | 57-12-5 | 27 | NS |
| Lead | 7439-92-1 | 400 | 63[c] |
| Manganese | 7439-96-5 | 2,000[c] | 1600[c] |
| Mercury (elemental) | 7439-97-6 | 0.73 | NS |
| Mercury (inorganic salts) | 115-09-3 | 1.2 | 0.18[c] |
| Nickel | 7440-02-0 | 130 | 30 |
| Selenium | 7782-49-2 | 1 | 3.9[c] |
| Silver | 7440-22-4 | 8.3 | 2 |
| Zinc | 7440-66-6 | 2,200 | 109[c] |
| **PCBs/Pesticides** | | | |
| 2,4,5-TP Acid (Silvex) | 93-72-1 | 3.8 | NS |
| 4,4'-DDE | 72-55-9 | 1.8 | .002[d] |
| 4,4'-DDT | 50-29-3 | 1.7 | .002[d] |

Table 375-3.8(a)
Track 1 - Unrestricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | Protection of Ecological Resources |
|---|---|---|---|
| 4,4'-DDD | 72-54-8 | 2.6 | .002[d] |
| Aldrin | 309-00-2 | 0.02 | 0.14 |
| alpha-BHC | 319-84-6 | 0.02 | NS |
| beta-BHC | 319-85-7 | 0.07 | 0.6 |
| Chlordane (alpha) | 5103-71-9 | 0.91 | 1.3 |
| delta-BHC | 319-86-8 | 0.25 | NS |
| Dibenzofuran | 132-64-9 | 14 | NS |
| Dieldrin | 60-57-1 | 0.04 | 0.016[b] |
| Endosulfan I | 959-98-8 | 4.8 | NS |
| Endosulfan II | 33213-65-9 | 4.8 | NS |
| Endosulfan sulfate | 1031-07-8 | 4.8 | NS |
| Endrin | 72-20-8 | 0.06 | 0.016[b] |
| Heptachlor | 76-44-8 | 0.38 | 0.14 |
| Lindane | 58-89-9 | 0.1 | 6 |
| Polychlorinated biphenyls | 1336-36-3 | 1 | 1 |
| **Semivolatile organic compounds** | | | |
| Acenaphthene | 83-32-9 | 98 | 20 |
| Acenapthylene | 208-96-8 | 100[a] | NS |
| Anthracene | 120-12-7 | 100[a] | NS |
| Benz(a)anthracene | 56-55-3 | 1[c] | NS |
| Benzo(a)pyrene | 50-32-8 | 1[c] | 2.6 |
| Benzo(b)fluoranthene | 205-99-2 | 1[c] | NS |
| Benzo(g,h,i)perylene | 191-24-2 | 100[a] | NS |
| Benzo(k)fluoranthene | 207-08-9 | 1.7 | NS |
| Chrysene | 218-01-9 | 0.59 | NS |

Table 375-3.8(a)
Track 1 - Unrestricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | Protection of Ecological Resources |
|---|---|---|---|
| Dibenz(a,h)anthracene | 53-70-3 | 0.33[b] | NS |
| Fluoranthene | 206-44-0 | 100[a] | NS |
| Fluorene | 86-73-7 | 100[a] | 30 |
| Indeno(1,2,3-cd)pyrene | 193-39-5 | 0.5[c] | NS |
| m-Cresol(s) | 108-39-4 | 0.33[b] | NS |
| Naphthalene | 91-20-3 | 12 | NS |
| o-Cresol(s) | 95-48-7 | 0.33[b] | NS |
| p-Cresol(s) | 106-44-5 | 0.33[b] | NS |
| Pentachlorophenol | 87-86-5 | 1.70[b] | 1.70[b] |
| Phenanthrene | 85-01-8 | 100[a] | NS |
| Phenol | 108-95-2 | 0.33[b] | 30 |
| Pyrene | 129-00-0 | 100[a] | NS |
| **Volatile organic compounds** | | | |
| 1,1,1-Trichloroethane | 71-55-6 | 0.68 | NS |
| 1,1-Dichloroethane | 75-34-3 | 0.27 | NS |
| 1,1-Dichloroethene | 75-35-4 | 0.33 | NS |
| 1,2-Dichlorobenzene | 95-50-1 | 1.1 | NS |
| 1,2-Dichloroethane | 107-06-2 | 0.01 | 10 |
| 1,2-Dichloroethene (cis) | 156-59-2 | 0.25 | NS |
| 1,2-Dichloroethene (trans) | 156-60-5 | 0.19 | NS |
| 1,3-Dichlorobenzene | 541-73-1 | 2.4 | NS |
| 1,4-Dichlorobenzene | 106-46-7 | 1.8 | 20 |
| 1,4-Dioxane | 123-91-1 | 0.15[b] | 0.15[b] |
| Acetone | 67-64-1 | 0.05 | 2.2 |
| Benzene | 71-43-2 | 0.06 | 70 |

Table 375-3.8(a)
Track 1 - Unrestricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | Protection of Ecological Resources |
|---|---|---|---|
| Butylbenzene | 104-51-8 | 12 | NS |
| Carbon tetrachloride | 56-23-5 | 0.76 | NS |
| Chlorobenzene | 108-90-7 | 1.1 | 40 |
| Chloroform | 67-66-3 | 0.37 | 12 |
| Ethylbenzene | 100-41-4 | 1 | NS |
| Hexachlorobenzene | 118-74-1 | 0.33[b] | NS |
| Methyl ethyl ketone | 78-93-3 | 0.12 | 100[a] |
| Methyl tert-butyl ether | 1634-04-4 | 0.93 | NS |
| Methylene chloride | 75-09-2 | 0.05 | 12 |
| Propylbenzene-n | 103-65-1 | 3.9 | NS |
| sec-Butylbenzene | 135-98-8 | 11 | NS |
| tert-Butylbenzene | 98-06-6 | 5.9 | NS |
| Tetrachloroethene | 127-18-4 | 0.75 | 2 |
| Toluene | 108-88-3 | 0.7 | 36 |
| Trichloroethene | 79-01-6 | 0.47 | 2 |
| Trimethylbenzene-1,2,4 | 95-63-6 | 3.6 | NS |
| Trimethylbenzene-1,3,5 | 108-67-8 | 8.4 | NS |
| Vinyl chloride | 75-01-4 | 0.02 | NS |
| Xylene (mixed) | 1330-20-7 | 1.6 | 0.26 |

All Soil clean up objectives (SCOs) are in parts per million (ppm)
NS=Not specified. See Technical Support Document (TSD).
[a] The SCOs for unrestricted use were capped at a maximum value of 100 ppm, as discussed in the TSD.
[b] For constituents where the calculated SCO was lower than the Contract Required Quantitation Limit (CRQL), the CRQL is used as the Track 1 SCO value.
[c] For constituents where the calculated SCO was lower than the rural the rural background, background is used as the Track 1 SCO.
[d] SCO is the sum of DDD, DDE and DDT

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| **Metals** | | | | | | |
| Arsenic | 7440-38-2 | 16[f] | 16[f] | 16[f] | 13[f] | 16[f] |
| Barium | 7440-39-3 | 400 | 400 | 27,000 | 433 | 820 |
| Beryllium | 7440-41-7 | 72 | 590 | 2,700 | 10 | 47 |
| Cadmium | 7440-43-9 | 4.3 | 9.3 | 60 | 4 | 7.5 |
| Chromium, hexavalent | 18540-29-9 | 110 | 400 | 800 | 0.4 | 19 |
| Chromium, trivalent | 16065-83-1 | 180 | 1,500 | 6,800 | 41 | NS |
| Copper | 7440-50-8 | 270 | 270 | 190,000 | 50 | 1,720 |
| Cyanide | 57-12-5 | 27 | 27 | 27,000 | NS | 40 |
| Lead | 7439-92-1 | 400 | 1,000 | 3,900 | 63[f] | 450 |
| Manganese | 7439-96-5 | 2,000[f] | 15,000 | 67,000 | 1600[f] | 2,000[f] |
| Mercury (elemental) | 7439-97-6 | 0.81 | 2.8 | 5.7 | NS | 0.73 |
| Mercury (inorganic salts) | 115-09-3 | 5.8 | 47 | 220 | 0.18[f] | NS |
| Nickel | 7440-02-0 | 310 | 310 | 27,000 | 30 | 130 |
| Selenium | 7782-49-2 | 180 | 1,500 | 6,800 | 3.9[f] | 1 |
| Silver | 7440-22-4 | 180 | 1,500 | 6,800 | 2 | 8.3 |

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| Zinc | 7440-66-6 | 11,000 | 89,000 | 410,000 | 109[f] | 2,480 |
| **PCBs/Pesticides** | | | | | | |
| 2,4,5-TP Acid (Silvex) | 93-72-1 | 100[a] | 500[b] | 1,000[c] | NS | 3.8 |
| 4,4'-DDE | 72-55-9 | 8.9 | 62 | 130 | .002[g] | 17 |
| 4,4'-DDT | 50-29-3 | 7.9 | 47 | 94 | .002[g] | 136 |
| 4,4'-DDD | 72-54-8 | 13 | 92 | 190 | .002[g] | 14 |
| Aldrin | 309-00-2 | 0.10 | 0.68 | 1.4 | 0.14 | 0.19 |
| alpha-BHC | 319-84-6 | 0.48 | 3.4 | 6.8 | NS | 0.02 |
| beta-BHC | 319-85-7 | 0.36 | 3 | 14 | 0.6 | 0.09 |
| Chlordane (alpha) | 5103-71-9 | 4.2 | 24 | 47 | 1.3 | 2.9 |
| delta-BHC | 319-86-8 | 100[a] | 500[b] | 1,000[c] | NS | 0.25 |
| Dibenzofuran | 132-64-9 | 59 | 350 | 1,000[c] | NS | 210 |
| Dieldrin | 60-57-1 | 0.2 | 1.4 | 2.8 | 0.016[e] | 0.1 |
| Endosulfan I | 959-98-8 | 24 | 200 | 920 | NS | 102 |
| Endosulfan II | 33213-65-9 | 24 | 200 | 920 | NS | 102 |
| Endosulfan sulfate | 1031-07-8 | 24 | 200 | 920 | NS | 1,000[d] |

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| Endrin | 72-20-8 | 11 | 89 | 410 | 0.016[e] | 0.06 |
| Heptachlor | 76-44-8 | 2.1 | 15 | 29 | 0.14 | 0.38 |
| Lindane | 58-89-9 | 1.3 | 9.2 | 23 | 6 | 0.1 |
| Polychlorinated biphenyls | 1336-36-3 | 1 | 1 | 25 | 1 | 3.2 |
| **Semivolatiles** | | | | | | |
| Acenaphthene | 83-32-9 | 100[a] | 500[b] | 1,000[c] | 20 | 98 |
| Acenapthylene | 208-96-8 | 100[a] | 500[b] | 1,000[c] | NS | 107 |
| Anthracene | 120-12-7 | 100[a] | 500[b] | 1,000[c] | NS | 1,000[d] |
| Benz(a)anthracene | 56-55-3 | 1.3 | 5.6 | 11 | NS | 0.52 |
| Benzo(a)pyrene | 50-32-8 | 1[f] | 1[f] | 1.1 | 2.6 | 22 |
| Benzo(b)fluoranthene | 205-99-2 | 1.3 | 6 | 11 | NS | 1.7 |
| Benzo(g,h,i)perylene | 191-24-2 | 100[a] | 500[b] | 1,000[c] | NS | 1,000[d] |
| Benzo(k)fluoranthene | 207-08-9 | 13 | 56 | 110 | NS | 1.7 |
| Chrysene | 218-01-9 | 13 | 56 | 110 | NS | 0.59 |
| Dibenz(a,h)anthracene | 53-70-3 | 0.33[e] | 0.56 | 1.1 | NS | 1,000[d] |
| Fluoranthene | 206-44-0 | 100[a] | 500[b] | 1,000[c] | NS | 1,000[d] |

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| Fluorene | 86-73-7 | 100[a] | 500[b] | 1,000[c] | 30 | 386 |
| Indeno(1,2,3-cd)pyrene | 193-39-5 | 1.3 | 5.6 | 11 | NS | 8.2 |
| m-Cresol(s) | 108-39-4 | 100[a] | 500[b] | 1,000[c] | NS | 0.33[e] |
| Naphthalene | 91-20-3 | 100[a] | 500[b] | 1,000[c] | NS | 12 |
| o-Cresol(s) | 95-48-7 | 100[a] | 500[b] | 1,000[c] | NS | 0.33[e] |
| p-Cresol(s) | 106-44-5 | 100[a] | 500[b] | 1,000[c] | NS | 0.33[e] |
| Pentachlorophenol | 87-86-5 | 6.7 | 6.7 | 55 | 1.70[e] | 1.70[e] |
| Phenanthrene | 85-01-8 | 100[a] | 500[b] | 1,000[c] | NS | 1,000[d] |
| Phenol | 108-95-2 | 100[a] | 500[b] | 1,000[c] | 30 | 0.33[e] |
| Pyrene | 129-00-0 | 100[a] | 500[b] | 1,000[c] | NS | 1,000[d] |
| **Volatiles** | | | | | | |
| 1,1,1-Trichloroethane | 71-55-6 | 100[a] | 500[b] | 1,000[c] | NS | 0.68 |
| 1,1-Dichloroethane | 75-34-3 | 26 | 240 | 480 | NS | 0.27 |
| 1,1-Dichloroethene | 75-35-4 | 100[a] | 500[b] | 1,000[c] | NS | 0.33 |
| 1,2-Dichlorobenzene | 95-50-1 | 100[a] | 500[b] | 1,000[c] | NS | 1.1 |
| 1,2-Dichloroethane | 107-06-2 | 3.1 | 30 | 60 | 10 | 0.01 |

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| 1,2-Dichloroethene (cis) | 156-59-2 | 100[a] | 500[b] | 1,000[c] | NS | 0.25 |
| 1,2-Dichloroethene (trans) | 156-60-5 | 100[a] | 500[b] | 1,000[c] | NS | 0.19 |
| 1,3-Dichlorobenzene | 541-73-1 | 49 | 280 | 560 | NS | 2.4 |
| 1,4-Dichlorobenzene | 106-46-7 | 13 | 130 | 250 | 20 | 1.8 |
| 1,4-Dioxane | 123-91-1 | 13 | 130 | 250 | 0.15[e] | 0.15[e] |
| Acetone | 67-64-1 | 100[a] | 500[b] | 1,000[c] | 2.2 | 0.05 |
| Benzene | 71-43-2 | 4.8 | 45 | 89 | 70 | 0.06 |
| Butylbenzene | 104-51-8 | 100[a] | 500[b] | 1,000[c] | NS | 12 |
| Carbon tetrachloride | 56-23-5 | 2.4 | 22 | 44 | NS | 0.76 |
| Chlorobenzene | 108-90-7 | 100[a] | 500[b] | 1,000[c] | 40 | 1.1 |
| Chloroform | 67-66-3 | 49 | 350 | 700 | 12 | 0.37 |
| Ethylbenzene | 100-41-4 | 41 | 390 | 780 | NS | 1 |
| Hexachlorobenzene | 118-74-1 | 1.2 | 6 | 12 | NS | 3.2 |
| Methyl ethyl ketone | 78-93-3 | 100[a] | 500[b] | 1,000[c] | 100[a] | 0.12 |
| Methyl tert-butyl ether | 1634-04-4 | 100[a] | 500[b] | 1,000[c] | NS | 0.93 |
| Methylene chloride | 75-09-2 | 100[a] | 500[b] | 1,000[c] | 12 | 0.05 |

Table 375-3.8(b): Track 2-Restricted Use Soil Cleanup Objectives

| Contaminant | CAS Number | Protection of Public Health | | | Protection of Ecological Resources | Protection of Ground-water |
|---|---|---|---|---|---|---|
| | | Restricted-Residential | Restricted-Commercial | Restricted-Industrial | | |
| Propylbenzene-n | 103-65-1 | 100[a] | 500[b] | 1,000[c] | NS | 3.9 |
| sec-Butylbenzene | 135-98-8 | 100[a] | 500[b] | 1,000[c] | NS | 11 |
| tert-Butylbenzene | 98-06-6 | 100[a] | 500[b] | 1,000[c] | NS | 5.9 |
| Tetrachloroethene | 127-18-4 | 3.5 | 25 | 51 | 2 | 1.3 |
| Toluene | 108-88-3 | 100[a] | 500[b] | 1,000[c] | 36 | 0.7 |
| Trichloroethene | 79-01-6 | 21 | 200 | 400 | 2 | 0.47 |
| Trimethylbenzene-1,2,4 | 95-63-6 | 52 | 190 | 380 | NS | 3.6 |
| Trimethylbenzene-1,3,5 | 108-67-8 | 52 | 190 | 380 | NS | 8.4 |
| Vinyl chloride | 75-01-4 | 0.9 | 13 | 27 | NS | 0.02 |
| Xylene (mixed) | 1330-20-7 | 100[a] | 500[b] | 1,000[c] | 0.26 | 1.6 |

All Soil clean up objectives (SCOs) are in parts per million (ppm)

NS=Not specified. See Technical Support Document (TSD).

[a] The SCOs for restricted-residential use were capped at a maximum value of 100 ppm, as discussed in the TSD.

[b] The SCOs for restricted-commercial use were capped at a maximum value of 500 ppm, as discussed in the TSD

[c] The SCOs for restricted-industrial use were capped at a maximum value of 1000 ppm, as discussed in the TSD

[d] The SCOs for protection of groundwater were capped at a maximum value of 1,000 ppm, as discussed in the TSD.

[e] For constituents where the calculated SCO was lower than the Contract Required Quantitation Limit (CRQL), the CRQL is used as the SCO value.

[f] For constituents where the calculated SCO was lower than the rural background, the rural background is used as the Track 1 SCO value.

[g] SCO is the sum of DDD, DDE and DDT.

(5) All Tracks.

(i) For all four Tracks, the threat to public health and the environment resulting from contamination in environmental media other than soil shall be evaluated in the development of remedial alternatives and addressed in the alternatives analysis to ensure that the remedial program meets the requirements of ECL 27-1415.1 and subdivisions 375-3.8(a)and (f).

(f) Alternatives analysis. An alternatives analysis evaluates each remedial alternative developed for a brownfield cleanup site, using the selection factors set forth in subdivision 375-1.8(f).

(1) An alternatives analysis must be prepared for each site, or operable unit of a site, unless:

(i) the Department has selected a remedy for the site prior to the approval of the application for participation;

(ii) the remedy proposed meets the requirements of Track 1; or,

(iii) a presumptive remedy is proposed from a Department list of presumptive remedies.

(2) Contents of an alternatives analysis. Each alternatives analysis must include, but is not limited to:

(i) a description of each alternative evaluated in the analysis;

(ii) a discussion of how each alternative would achieve the soil cleanup objectives for the Track(s) to be evaluated for the site;

(iii) an analysis of each alternative against the remedy selection factors set forth in subdivision 375-1.8(f) followed by a comparison of this evaluation to any other alternatives under consideration;

(iv) an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls required by ECL 27-1415.7(a);

(v) if applicable, an evaluation of feasible remedial alternatives that can achieve groundwater plume stabilization in accordance with subdivision 375-1.8(d);

(vi) an identification of the alternative preferred by the applicant for selection;

(vii) a summary of the proposed remedy and basis for concluding that the proposed remedy represents the best alternative among those considered; and

(viii) other information required by the Department.

(3) Alternatives to be evaluated. Every alternatives analysis must evaluate:

(i) at least one unrestricted alternative that meets the requirements of Track 1 in paragraph 375-3.8(e)(1), unless a presumptive remedy is selected from a Department approved list;

(ii) such other alternatives which may be developed by the applicant;

(iii) for sites determined by the Department to constitute a significant threat, such additional alternatives as the Department may require; and

(iv) for sites where the Department has determined that a significant threat is not posed by the site, the Department may require a Track 2 evaluation if one has not already been considered pursuant to subparagraph (i) or (ii) after considering the following:

*(1)* the degree to which the remedy selection criteria would be better satisfied by a Track 2 cleanup;

*(2)* the degree of impact a Track 2 cleanup would have on the applicant's ability to successfully cleanup and/or redevelop the property;

*(3)* the benefit to the environment to be realized by the expeditious remediation of the property; and

*(4)* the economic benefit to the State to be realized by the expeditious remediation of the property.

(4) Plume stabilization: In developing remedies for a site where plume stabilization in accordance with subdivision 375-1.8(d) is a necessary component of the remedy, a participant is required to address the plume, both on site and off site, while a volunteer is only required to prevent the further migration of contamination from the site to the extent feasible, including any actions necessary to maintain and monitor such stabilization.

(5) Soils with concentrations of contaminants greater than those set forth in Table 375-3.8(a) may not be removed from the site unless such removal is in full compliance with the site management plan and all applicable State and federal requirements.

(g) Remedial work plan.

(1) A remedial work plan must be prepared in accordance with ECL 27-1411.2 and must provide for the development and implementation of a remedy for:

(i) on-site contamination if the applicant is a volunteer; and

(ii) on-site and off-site contamination if the applicant is a participant.

(2) The remedial work plan must implement the Department's record of decision if the Department had issued such a decision under subpart 375-2 or subpart 375-4 prior to the approval of an applicant's application.

(3) A remedial work plan must include at a minimum:

(i) a summary of the site history and the nature and extent of contamination;

(ii) remedial action objectives;

(iii) a summary of the current, intended, and reasonably anticipated future use of the site;

(iv) identification of the cleanup track to be used for remediation of the site as described in subdivision 375-3.8(e);

(v) identification and evaluation of any and all institutional or engineering controls to be employed as part of the site remedy;

(vi) an alternatives analysis as described in subdivision 375-3.8(f); and

(vii) other information as required by the Department.

(4) The remedial work plan will form the basis of the Department's decision for a site. Where a remedial work plan will also serve as the remedial design document for a site, it shall include, but not be limited to, the following design elements:

(i) site health and safety plan;

(ii) community health and safety plan;

(iii) quality assurance and quality controls plans for sampling, analysis, and construction; and

(iv) site management plan, if the remedy includes any institutional or engineering controls.

(h) Institutional and engineering controls can be included as part of a remedial work plan provided there is compliance with subdivision 375-1.8(i) and they are evaluated in the alternative analysis.

(i) Interim remedial measures. Interim remedial measures may be carried out as part of a remedial program.

**375-3.9 Certificate of completion.**

(a) Liability limitation:

(1) Subsequent to the issuance of a certificate of completion, the applicant shall be entitled to the liability limitation protections set forth at ECL 27-1421, subject to the terms and conditions stated therein.

(b) Liability limitation reopener provisions.

(1) If the Department seeks to exercise its rights reserved pursuant to ECL 27-1421(2), it shall provide notice to the certificate holder, as set forth in subdivision 375-1.9(e).

(2) The certificate holder shall have 30 days after the effective date of the notice within which to cure the deficiency or seek dispute resolution. If the certificate holder or current title owner does not cure the deficiency or seek dispute resolution within such 30 day period, the liability protections shall be deemed modified or vacated on the 31st day after effective date of the Department's notice.

(c) Modification or revocation of the certificate of completion.

(1) If the Department seeks to modify or revoke the certificate of completion, it shall provide notice to the certificate holder as set forth in subdivision 375-1.9(e).

(2) the certificate holder shall have 30 days after the effective date of the notice within which to cure the deficiency or seek a hearing. If the certificate holder or current title owner does not cure the deficiency or seek a hearing within such 30 day period, the liability protections shall be deemed modified or vacated on the 31st day after the effective date of the Department's notice.

(d) Tax credits. The certificate of completion entitles the applicant to file for brownfield tax credits under Articles 21,22 and 23 of the Tax Law. Only those costs incurred on or after the effective date of the brownfield site cleanup agreement are eligible for consideration for credits.

**375-3.10 Citizen participation.**

(a) Upon the Department's determination that an application is complete:

(1) a notification of the commencement of a 30 day comment period on the request to participate must be placed in the environmental notice bulletin by the Department; and

(2) newspaper notices, as defined in ECL 27-1405.22, must be prepared by the Requestor and, subject to Department review and approval, published in a local newspaper and mailed to the brownfield site contact list.

(b) Citizen participation plans.

(1) Applicants shall prepare a site-specific citizen participation plan in accordance with ECL 27-1417.2 and section 375-1.10. This plan shall include provision for all notices, fact sheets and comment periods for remedial program milestones required by ECL 27-1417.3 and section 375-1.10. The citizen participation plan, must be submitted to the Department for approval. The remedial investigation work plan will not be approved until such time as the citizen participation plan has been approved.

(2) Unless otherwise determined by the Department, all notices and fact sheets for the required milestones shall be prepared by the Applicant and approved by the Department prior to issuance.

(i) Department approved notices and fact sheets shall be distributed by the Applicant to all parties on the brownfield site contact list.

(ii) Within 5 days of mailing such notices and fact sheets the Applicant shall provide proof of compliance with the notice requirements on a form approved by the Department.

(iii) All notices and facts sheets must be included in the document repository. Notices and facts sheets can be combined with the approval of the Department.

(c) Technical assistance grants may be made to qualifying community groups for a brownfield site where the Department has determined such site constitutes a significant threat.

(1) Grants may be used:

(i) to obtain technical assistance in interpreting information with regard to the nature of the hazard posed by contaminants located at or emanating from a qualifying site;

(ii) to hire health and safety experts to advise affected residents on any health assessments; and

(iii) for the training and education of interested affected community members to enable them to more effectively participate in the remedy selection process.

(2) Grants may not be used for:

(i) collecting field sampling data;

(ii) political activity; or

(iii) lobbying legislative bodies.

(3) Qualifying community groups. A community group must meet the following criteria to be eligible:

(i) be either a domestic not-for-profit corporation as defined at NPCL 102.a(5) or an authorized foreign not-for-profit corporation as defined at NPCL 102.a(7);

(ii) be exempt from taxation under section 501(c)(3) of the internal revenue code. In determining this criterion, the Department may consider any evidence which could be considered by a court pursuant to CPLR 3211(a)(11);

(iii) be affected by a remedial program for such site;

(iv) not be sustained by or controlled by or affiliated with any person that is responsible for such site according to applicable principles of statutory or common law liability; and

(v) demonstrate that its membership resides in the community and represents the interests of the community affected by such site. In determining this criterion, the Department may consider any evidence that its members' health, economic well-being or enjoyment of the environment are potentially affected by such site.

(4) Grant Amounts. The total amount of all technical assistance grants awarded for a particular brownfield site is limited to $50,000. The amount of each technical assistance grant:

(i) will be determined by the Department based upon the scope of work in the application; and

(ii) the grant recipient may request increases to its grant, up to the maximum $50,000 per site. The request should be in writing and include appropriate justification and a budget.

(5) Grant applications. A community group desiring to obtain a grant shall submit an application to the Department in such form and manner, and containing such information, as the Department may require . A complete application consists of a:

(i) completed application form containing such information as the Department may prescribe; and

(ii) a certification by a responsible officer of the corporation, in a form provided by the Department, which certifies at a minimum that:

*(a)* the corporation is not sustained by or controlled by or affiliated with any person that is responsible for the site according to applicable principles of statutory or common law liability;

*(b)* all statements made for the purpose of obtaining a grant either are set out in full on this application or are set out in full in exhibits attached to this application and incorporated herein by reference;

*(c)* all information included in this application, including attachments, is accurate to the best of his/her knowledge;

*(d)* that the undersigned is authorized to execute this application for the corporation; and

*(e)* acknowledges that a false statement made in the certification is punishable as a class "A" misdemeanor pursuant to section 210.45 of the Penal Law.

(6) A technical assistance grant shall be made by the Department pursuant to a State assistance contract between the Department and the grant recipient as set forth in subdivision 375-2.5(c). The State assistance contract shall contain such terms and conditions as the Commissioner may deem to be appropriate. All such grants are recoverable State costs subject to recovery from responsible parties.

(7) The Department may require a responsible party, as defined in subdivision 375-1.2(g), to provide a technical assistance grant directly to a qualifying community group. Such responsible party shall provide for a grant consistent with the requirements of this section within a time frame directed by the Department.

**375-3.11 Miscellaneous.**

(a) Prohibitions. No person to whom a request has been made pursuant to ECL 27-1431 shall fail to comply therewith.

(b) State Environmental Quality Review Act applicability

(1) Remedy selection and implementation of remedial actions under Department approved work plans pursuant to Title 14 of Article 27 of the ECL are not subject to review pursuant to Article 8 of the ECL and its implementing regulations (6 NYCRR Part 617), provided that design and implementation of the remedy do not:

(i) commit the Department or any other agency to specific future uses or actions; and

(ii) prevent evaluation of a reasonable range of alternative future uses of or actions on the remediation site.

(2) In the event that the use of the site, as set forth in the remedy selection document for the site, changes during the implementation of the remedial program, the Department may make a new determination whether such remedial action remains protective of public health and the environment and, if the Department makes such a finding, it will require that the remedial action be modified to be protective of public health and the environment.

(3) The SEQRA exemption set forth in this subdivision is in addition to, and not in place of, other exemptions to SEQRA that apply pursuant to Parts 617 or 618 (e.g. the enforcement exemption).

(c) State funding.

(1) The Department may, in accordance with ECL 27-1411.5, expend moneys from the hazardous waste remedial fund established pursuant to SFL 97-b and/or from the New York environmental protection and spill compensation fund established pursuant to NL 179, as appropriate, to pay, in whole or in part, the State costs incurred in the development and implementation of a remedial program for off-site contamination at a brownfield site where:

(i) the applicant is a volunteer; and

(ii) the site presents a significant threat.

(2) All State costs incurred pursuant to 375- 3.11(c)(1) may be recovered from any person responsible according to applicable principles of statutory or common law liability other than the volunteer.

# Subpart 375-4
# Environmental Restoration Program

Part 375-4 deleted new language follows

**375-4.1 Purpose; applicability.**

This subpart applies to the development and implementation of remedial programs for environmental restoration projects. This subpart addresses requirements in addition to those requirements identified in subpart 375-1.

**375-4.2 Definitions.**

As used in this subpart, the following terms have the following meanings:

(a) "Alternatives analysis" means a study undertaken to develop and evaluate options for remedial action, emphasizing data analysis.

(b) "Change of use" means the transfer of title to all or part of property subject to an environmental restoration project, the erection of any structure on such property, the creation of a park or other public or private recreational facility on such property, any activity that is likely to disrupt or expose hazardous substances or to increase direct human exposure, or any other conduct that will or may tend to significantly interfere with an ongoing or completed environmental restoration project.

(c) "Community based organization" means a not-for-profit corporation, exempt from taxation under section 501(c)(3) of the internal revenue code whose stated mission is promoting reuse of brownfield sites within a specified geographic area in which the community based organization is located, which has twenty-five percent or more of its board of directors residing in the community in such area; and represents a community with a demonstrated financial need. "Community based organization" shall not include any not-for-profit corporation that has caused or contributed to the release or threatened release of contamination from or onto the brownfield site, or any not-for-profit corporation that generated, transported, or disposed of, or that arranged for, or caused, the generation, transportation, or disposal of contamination from or onto the brownfield site. This definition shall not apply if more than twenty-five percent of the members, officers or directors of the not-for-profit corporation are or were employed by or receiving compensation from any person responsible for a site under ECL article 27 title 13 or NL article 12 or under applicable principles of statutory or common law liability.

(d) "Cost" means "cost" as defined at subdivision 375-2.2(d)except that such term shall not include the requirement to reduce the cost of an approved project in accordance with any federal or State funds received or to be received by the municipality.

(e) "Disposition of the restoration site" means the leasing or the transfer of title interest in the site through sale or other means.

(f) "Municipality" means a local public authority or public benefit corporation, a county, city, town, village, school district, supervisory district, district corporation, improvement district within a county, city, town or village, or Indian nation or tribe recognized by the state or the United States with a reservation wholly or partly within the boundaries of New York state, or any combination thereof.

(g) "Public recreational use" means a use for public purposes or for public recreational purposes.

(h) "Restoration investigation project" means a project, undertaken in accordance with the requirements of this subpart, to investigate contamination located in, on, or emanating from real property held in title by a municipality, or under a temporary incidents of ownership set forth in ECL 56-0508.

(i) "Restoration remediation project" means a project, undertaken in accordance with the requirements of this subpart, to remediate contamination located in, on, or emanating from real property held in title by a municipality.

(j) "State assistance" means in the case of a State assistance contract authorized by ECL 56-0503(1) of the ECL and section 375-4.5, payments made to a municipality to reimburse the municipality for the state share of the costs incurred by the municipality to undertake an environmental restoration project.

**375-4.3 Eligibility.**

(a) Eligible site. A site is eligible if:

(1) It is not listed in the Registry as a class "1" or "2" site at the time of application;

(2) It is owned by the municipality, or for an investigation application, an order granting temporary incidents of ownership to the municipality has been obtained. Such ownership or order must be obtained prior to the Department's execution of the State assistance contract. A municipality that co-own a site with a not-for-profit corporation as defined at NPCL 102.a(5) or an authorized foreign not-for-profit corporation as defined at NPCL 102.a(7) is considered to own the site for purposes of applying for State assistance under this subpart;

(3) The source of the site's contamination is located on the site, provided however, the source can be off-site if the remedial action identified in the record of decision for the site selects a remedy that can eliminate recontamination of the site from the off-site source in a cost-effective manner.

(b) Eligible municipality. A municipality is eligible if it:

(1) Did not generate, transport or dispose of, nor arranged for nor caused the generation, transportation or disposal of, any contaminant on the site. For these purposes, a municipality is not considered a generator, transporter, or arranger:

(i) for having rendered care, assistance, or advice in the course of an incident creating a danger to public health or welfare or to the environment as a result of any release of a contaminant or the threat of same; or

(ii) for having leased a site to another party that generated, transported or disposed of, or that arranged for or caused the generation, transportation or disposal of, any contaminant on such site unless such municipality knew that such other party generated, transported or disposed of, or arranged for or caused the generation, transportation or disposal of, such contaminant and failed to take any action to remediate, or cause the remediation of such contaminant.

(2) Did not take title to a site from a municipality not eligible to apply for State assistance under ECL article 56 title 5 by reason of its having generated, transported or disposed of, or having arranged for or caused the generation, transportation or disposal of, any contaminant on the site, and either municipality is a local public authority or public benefit corporation, or improvement district and title was acquired on or after June 6, 1996.

(c) Eligible project. The Department will determine the eligibility of an investigation project based upon the following criteria set forth in ECL 56-0505.1:

(1) Benefit to the environment realized by the expeditious remediation of the property proposed to be subject to such project;

(2) Economic benefit to the state by the expeditious remediation of the property proposed to be subject to such project;

(3) Potential opportunity of the property proposed to be subject to such project to be used for public recreational purposes;

(4) Real property is located in a designated brownfield opportunity area set forth in section 970-r of the GML; and

(5) Opportunity for other funding sources to be available for the remediation of such property, including, but not limited to, enforcement actions against responsible parties (other than the municipality to which state assistance was provided under this title; or a successor in title, lender, or lessee who was not otherwise a responsible party prior to such municipality taking title to the property), state assistance payments set forth in ECL article 27 title 13, and the existence of private parties willing to remediate such property using private funding sources. Highest priority shall be granted to projects for which other such funding sources are not available.

(d) Eligible costs. The costs set forth in paragraphs (1) through (7) below, within the limits of the SFL, are eligible for being considered in the calculation of State assistance under ECL article 56 title 5. The

reimbursement rates for these eligible costs are set forth below.

(1) Costs eligible at a reimbursement rate of up to 90 percent are those:

(i) authorized by the municipality and the Department that are directly related to the project's implementation;

(ii) to implement Department-approved investigation work plans;

(iii) to implement Department-approved on-site remediation work plans, including those remediation costs incurred with the Department's prior approval after the record of decision is issued;

(iv) to implement the measures necessary to satisfy the requirements of this subpart;

(v) costs incurred for the implementation of an active treatment remedy for up to five years after commencement of the remedy.

(2) The eligible costs identified in paragraph (1) or (7) of this subdivision incurred to investigate or remediate off-site contamination attributable to the environmental restoration project may be reimbursed at a rate of up to 100 percent.

(3) The costs to demolish structures and dispose of the resulting demolition debris are eligible, at a reimbursement rate of up to 50 percent. In no event, however, will the Department reimburse the cost of a project consisting exclusively, or almost exclusively, of demolition of a structure.

(4) Costs associated with the disposal of any demolition debris from paragraph (2) that must be disposed in a disposal facility subject to Part 373 of this title may be reimbursed at rate of up to 90 percent.

(5) The cost for asbestos abatement projects that consist of any measure designed to reduce exposure to, remove, or eliminate asbestos or asbestos-containing material from inside a structure are eligible, at a reimbursement rate of up to 50 percent. In no event, however, will the Department reimburse:

(i) the cost of a project consisting exclusively, or almost exclusively, of asbestos abatement inside a structure; or

(ii) greater than 50 percent of the cost of the asbestos abatement activities inside a structure.

(6) Costs associated with the disposal of any asbestos from paragraph (4) may be reimbursed at a rate of up to 90 percent provided that the asbestos:

(i) must be disposed in a disposal facility subject to Part 373 of this title, or

(ii) is present in an environmental media outside of a structure.

(7) The eligibility and reimbursement rate of any cost a municipality may incur that is not identified in this subdivision, may be considered on a case-specific basis. In making such determinations, the Department will consider whether:

(i) incurring the cost is necessary for implementation of the approved project;

(ii) it is a reasonable cost that was incurred under contract or municipal force account pre-approved by the Department, provided, however, that costs incurred for legal services are eligible only to the extent that they are necessary for actual project implementation; and

(iii) it is properly documented.

(e) Ineligible costs. The following costs, which are ineligible for being considered in the calculation of State assistance under ECL article 56 title 5, are those incurred:

(i) before the start date identified in the State assistance contract, including those to prepare and submit the State assistance application and those to procure and retain legal, engineering, and other services to undertake the project;

(ii) to undertake site management at the site after construction of the Department-approved remedy, except those identified in subparagraph 375-4.3(d)(1)(v);

(iii) to redevelop the site that are not necessary to remediate the site;

(iv) that are reimbursed by, or recovered from, any other responsible party or insurance carrier or the federal government;

(v) outside the scope of, or in violation of , the State assistance contract;

(vi) in violation of applicable statutes or regulations;

(vii) for which appropriations are not available; or

(viii) for lead abatement projects consisting of measures designed to reduce exposure to lead-contaminated dust or paint, including any treatment, disposal, or testing associated with such measures. Provided, however, that costs associated with lead abatement projects consisting of measures designed to reduce lead in or on environmental media are eligible.

(f) If the site is already subject to an existing enforceable federal, State, or local requirement reflected in an order, agreement or State assistance contract directing a remedial party other than the municipality to investigate or remediate the site, the Department will consider eligible for State assistance only that portion of the investigative or remedial tasks which such order, agreement or State assistance contract does not cover.

**375-4.4 Applications.**

(a) Applications.

(1) Applications shall be submitted to the Department in such form and manner, and containing such information as the Department may require. An application:

(i) may be submitted for either an investigation or a remediation project; and

(ii) form, including all attachments, must be submitted both in hard copy and in an electronic format acceptable to the Department.

(2) A complete application shall contain information relative to the site necessary to determine site eligibility in accordance with section 375-4.3.

(3) The application must demonstrate that the project is intended to result in a benefit to the environment and in either, an economic benefit to the State, or a public recreational use.

(4) The application shall be signed by the individual authorized to sign on behalf of the municipality, and include the following certifications:

(i) the municipality has not generated, transported or disposed of, arranged for, or caused the generation, transportation or disposal of any contaminant on that site;

(ii) the municipality will not undertake any indemnification obligation respecting a party responsible under law for the remediation of the site, and, if the municipality leased such site to another party that generated, transported or disposed of, or that arranged for or caused the generation, transportation or disposal of, any contaminant on such site, the municipality did not know that such other party generated, transported or disposed of, or arranged for or caused the generation, transportation or disposal of, such contaminant or so knew and took action to remediate, or cause the remediation of such contaminant;

(iii) no other funding sources currently exist to undertake the project except the municipality's and those other sources identified in this application; and

(iv) all statements made for the purpose of obtaining State assistance for the proposed project either are set out in full on this application, or are set out in full in exhibits attached to this application and incorporated by this reference.

(5) If at the time of application for a remediation project, the Department has not issued a record of decision, the municipality must:

(i) provide sufficient information for the Department to develop a proposed remedial action plan and assist the Department with any necessary citizen participation activities; or

(ii) if a complete remedial investigation and alternatives analysis has not been completed,

complete the investigation and alternatives analysis prior to its application being processed by the Department.

(b) Complete Application.

(1) The Department will review applications to determine whether the application is a complete application.

(i) an application shall be deemed complete when the Department determines that it contains information addressing each application requirement of the statute and this Part and contains all information necessary to initiate formal processing of the application.

(ii) if the Department determines that the application is not a complete application, it will so notify the municipality identifying the deficiencies.

(2) For investigation projects, the Department may enter into State assistance contracts to the extent monies are available. Such contracts will be entered into based upon the order of receipt of a complete application.

(3) For remediation projects, the Department may enter into State assistance contracts to the extent monies are available. The Department will prioritize complete applications according to a priority ranking score. The Department will assign a priority ranking score to each complete application based upon the total points assigned set forth in paragraph 375-4.4(b)(4).

(4) The Department will assign priority ranking score points to the criteria applicable to scoring a remediation project, with the final priority ranking score being determined by adding the totals described in subparagraphs 375-4.4(b)(4)(i) through (iv) and then subtracting from that total the total from subparagraph 375-4.4(b)(4)(v). The criteria and their associated scoring points are as follows:

(i) benefit to the environment; t he Department will assess a maximum of 50 points based on the nature and extent of contamination found in, on, or under, or emanating from, the site and the environmental and/or public health benefits associated with the site's expeditious remediation;

(ii) economic benefit to the State; the Department will assess a maximum of 50 points based on the site's expeditious remediation to enhance its marketability, on its location in an economically distressed area, and on its potential for State and local tax revenue generating activities;

(iii) potential opportunity for public recreational use; the Department will assess a maximum of 50 points where the municipality has legally committed itself to implement a specific public recreational use of the site;

(iv) site is located in a brownfield opportunity area designated set forth in GML 970R; the Department will assess a maximum of 25 points if the site is located in a designated brownfield opportunity area; and

(v) opportunity for other sources to fund the project, where available; the Department will assess a maximum of 15 points under this criterion.

(5) Approval of an application for State assistance to undertake an investigation project does not bind the Department to approve State assistance to undertake a remediation project nor to provide any assurance of approval or availability of funds for remediation.

(6) If the field work for a project for which State assistance is provided is not initiated within 12 months of the Department's approval of its application, or such other time period as the Department may approve, the municipality will be notified in writing of its failure to implement the project, the project will be removed from the approved list, and the Department will reallocate monies allocated to the removed project for other complete applications.

**375-4.5 State assistance contracts.**

(a) In addition to such further terms and conditions as the Department may require in the State assistance

contract, the State assistance contract shall be deemed to include, and the municipality shall comply with, all of the provisions set forth in section 375-1.5(b)(1) and (4).

(b) The State assistance contract will also be deemed to include, and the municipality shall also comply with, the following provisions:

(1) The municipality must not enter into, or renew, a lease concerning, nor transfer title to, the site, or any portion of it, until the municipality binds itself and its lessees and its successors in title, to the following conditions that:

(i) the site is remediated under Department oversight in accordance with the Department's record of decision and that the site, or any subdivided parcel within the site, is not used for any purpose until it is so remediated, except that the site may continue to be used for the purpose for which it is being used as of the effective date of the state assistance contract, if the Department determines that the existing state of contamination does not pose a risk sufficient to prohibit such use from continuing, giving due regard for public health and environmental protection;

(ii) if, before the Department issues a certificate of completion, the municipality, or a successor in title, wishes to transfer title to or subdivide the site into separate parcels, it may do so after it commits in a document, approved by the Department, to remediate all of the site in accordance with the Department's record of decision, within such time period as the Department may require.

(iii) the site will not be used for any purpose requiring a level of contamination lower than that serving as the basis for the remediation identified in the record of decision;

(iv) any engineering or institutional controls or both such controls, that the Department may deem necessary to allow the contemplated use of the site to proceed will be imposed and maintained. The municipality will cause the development of a plan, and submit such plan to the Department for its review and approval, to ensure that such controls are continually maintained in the manner the Department may require. The municipality and its lessees and successors in title are prohibited from challenging the imposition or continuance of such controls, and failure to implement the Department-approved plan or to maintain such controls constitute a violation of the State assistance contract and for the duration of such failure, the liability protections and benefits set forth at ECL 56-0509.1 will have no force and effect;

(v) the Department will have access to the site, at times appropriate to the circumstances and subject to the site health and safety plan, for purposes of ensuring that:

(*a*) the site is investigated or remediated in accordance with the Department-approved plans for the remedial investigation or remediation;

(*b*) the site management plan, where necessary for the remedy, including the operation, maintenance, and monitoring requirements identified in paragraph 375-4.8(b)(8) is being implemented satisfactorily;

*(c)* the engineering and/or institutional controls, where necessary for the remedy, identified in paragraph 375-4.8(b)(8) are continually maintained in the manner the Department may require;

(*d*) the Department may carry out any measures necessary to return the site to a condition sufficiently protective of public health, in accordance with ECL 56-0509.4;

(vi) neither the municipality nor any of its lessees or successors in title shall interfere with such access; and

(vii) the municipality must make this binding commitment by means of an environmental easement and/or lease provisions, which provide that the Department (in addition to the municipality) may enforce the environmental easement and/or lease provisions, and that the municipality shall record an environmental easement in accordance with the requirements of ECL article 71 title 36 within 45 days of the receipt of notice from the Department that the environmental easement must be recorded.

(2) The municipality must revise any existing leases concerning the site, or any portion of it, to ensure that the site's use will be suspended upon a Department determination that such use cannot continue with sufficient protection of the public health until the conditions giving rise to such determination are addressed to the Department's satisfaction. The municipality must provide in such lease for the Department to have access to the site, at times appropriate to the circumstances and subject to the site's health and safety plan, if any, for purposes of ensuring that:

(i) the site is investigated and remediated in accordance with Department-approved plans;

(ii) the site management plan, including the operation, maintenance, and monitoring requirements identified in paragraph 375-4.8(b)(8) is being implemented satisfactorily;

(iii) the Department may carry out any measures necessary to return the site to a condition sufficiently protective of public health, in accordance with ECL 56-0509.4; and

(iv) such lease shall provide that neither the municipality nor any of its lessees or successors in title shall interfere with such access.

(3) If any responsible party payments and/or other responsible party consideration become available to the municipality which were not included when the State share was calculated for the State assistance contract, the municipality shall immediately notify the Department of such availability and the Department shall recalculate the amount of the State share. The Department has the option of either reducing the Contract amount if the project is ongoing or requesting reimbursement of the amount owed to the State, for deposit in an appropriate account. The State will calculate the amount owed by the municipality based on the recalculated State assistance amount and the amount the State has reimbursed the municipality as of the date of the recalculation. If the municipality fails to make such repayment within 60 days of notification, the Department may take measures provided for by statute relating to the recovery of unrepaid State Assistance.

(4) In the event that any monies received from the disposition of the site exceed the municipality's cost of such site, including taxes owed to the municipality upon acquisition, and the municipality's cost of the environmental restoration project, the amount necessary to reimburse the State for the State assistance provided to the municipality under this Part shall be paid to the State for deposit into the environmental restoration project account of the hazardous waste remedial fund established under SFL 97-b.

(5) The Department will notify the municipality if the Commissioner determines that the municipality:

(i) has failed to comply with any of the requirements of applicable State or federal laws and regulations;

(ii) has failed to comply with any of the requirements of the State assistance contract;

(iii) has failed to initiate, proceed with, or complete the Department-approved project in accordance with its schedule without good cause, as determined by the Department; or

(iv) has changed the Department approved project or any portion thereof without the Department's prior written approval.

(6) Such notice shall set forth in writing the reasons for such determination, and will afford the municipality a reasonable time within which to cure such failure. The Department will suspend payments under the State assistance contract until the municipality has cured the failure. The Department may terminate the State assistance contract if the failure is not cured within a reasonable time.

(7) While the municipality may make efforts to recover response costs from responsible parties, it must provide the Department with timely advance written notice of any negotiations, proposed agreements, proposed settlements or legal action by which recovery is sought and must not commence such legal action nor enter into any such proposed agreement or settlement without prior written Department approval.

(8) The municipality must assist the Department or other State agencies in compelling responsible

parties to contribute to the cost of the project at the site, such assistance encompassing, at a minimum, the provision of all information which the municipality has or acquires during the course of project implementation, and thereafter, related to the identification of the responsible parties for the contaminants disposed at, or released from, the site. Further, the municipality shall not perform any act or omission which compromises the cost recovery efforts of the Department or other State agencies.

(9) Indemnification. The remedial party shall indemnify and save harmless the Department and the State of New York from and against all losses from claims, demands, payments, suits, actions, recoveries and judgments, of every nature and, description brought or recovered against it by reason of any acts or omissions of the remedial party, its agents, employees, or subcontractors in the performance of this order, agreement or State assistance contract which are shown to have been the result of negligence, gross negligence or reckless, wanton or intentional misconduct.

(c) The municipality and those identified in ECL 56-0509.1(a) will have the benefits identified in ECL 56-0509 (liability limitation) retroactive to the date of the Department approval of the State assistance application once the Department issues the certificate of completion.

**375-4.6 Reserved.**

**375-4.7 Significant threat and Registry determinations.**

(a) Registry determinations. In accordance with subdivision 375-2.7(c), the Department may defer its assessment or reassessment of a site's classification or reclassification in the Registry if good faith negotiations are ongoing to enter into a State assistance contract and, following its execution, the municipality is in compliance with the terms of such contract. The Department shall assess or reassess such site upon termination of the State assistance contract.

**375-4.8 Remedial program.**

(a) An environmental restoration investigation project includes the remedial investigation, the alternatives analysis report and the Department decision document. The municipality must implement the Department-approved remedial investigation work plan, and any revisions thereto.

(b) The goal of the program for a specific site is to select a remedy that is protective of public health and/or the environment. At a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment presented by contaminants disposed at the site through the proper application of scientific and engineering principles. The process of selecting a remedy shall be documented in a decision document, which will consist of the following:

(1) The location and description of the site;.

(2) A history of the operation of the site;.

(3) The current environmental and public health status of the site;.

(4) An enforcement history of the site;.

(5) The specific goals and objectives of the remedy selected for the site;.

(6) A description and evaluation of the alternatives considered, except in the case of no further action remedies;

(7) A summary of the basis for the Department's decision;

(8) A description of the selected remedy, including the site management requirements and an identification of any necessary institutional and engineering controls;

(9) A list of the documents the Department used in its decision making; and

(10) A responsiveness summary.

(c) Off-site contamination. The remedy selected for a site shall eliminate or mitigate to the extent feasible, the recontamination of the site from any off-site source. The Department may require remedial action to prevent or minimize the impact of the off-site contamination on the site.

(d) Remediation. An environmental restoration remediation project includes the design and implementation of the remedial action for the site that the Department selected in the decision document.

**375-4.9 Certificate of completion.**

(a) The municipality shall be entitled to the liability protections and benefits set forth at ECL 56-0509, subject to the terms and conditions stated therein, upon receipt of a certificate of completion from the Department.

(b) Modification or revocation of a certificate of completion.

(1) If the Department seeks to exercise its rights reserved set forth in ECL 56-0509(2), it shall modify or revoke the certificate of completion as set forth in subdivision 375-1.9(e).

(2) The certificate holder shall have 30 days from the effective date of the notice within which to cure the deficiency or seek dispute resolution. If the certificate holder or current title owner does not cure the deficiency or seek dispute resolution within such 30 day period, the certificate of completion shall be deemed modified or vacated on the 31st day after the effective date of the Department's notice.

**375-4.10 Citizen participation.**

(a) The Department will require that opportunities for public involvement be included in the development and implementation of an environmental restoration project.

(b) The Department will communicate with and solicit the views of all interested parties. To accomplish this, at the appropriate time, the Department will require a municipality to, at a minimum:

(1) Mail to the site contact list a notice and brief analysis of the remedy that the Department proposes to be undertaken at such site, which includes sufficient information to provide a reasonable explanation of that proposed remedy, including but not limited to, a summary of the Department's reasons for preferring it over other alternatives considered and of the construction and site management requirements of that proposal; and

(2) Provide a 45 day period for submission of written comments and, if significant substantive issues on the proposed remedial action plan are raised, an opportunity for submission of oral comments at a public meeting near the site. The Department shall summarize the comments received and make the summary available to the public.

(3) The Department may require a municipality to mail additional notices and/or fact sheets to those on the site contact list.

(c) All key documents developed will be made available in the document repository.

**375-4.11 Miscellaneous.**

(a) Prohibitions. No person to whom a request has been made set forth in ECL 56-0515 shall fail to comply therewith.

(b) State Environmental Quality Review Act applicability

(1) Remedy selection and implementation of remedial actions under Department approved work plans set forth in Title 5 of Article 56 of the ECL are not subject to review set forth in Article 8 of the ECL and its implementing regulations (6 NYCRR Part 617), provided that design and implementation of the remedy do not:

(i) commit the Department or any other agency to specific future uses or actions; and

(ii) prevent evaluation of a reasonable range of alternative future uses of or actions on the remediation site.

(2) In the event that the use of the site, as set forth in the remedy selection document for the site,

changes during the implementation of the remedial program, the Department may make a new determination whether such remedial action remains protective of public health and the environment and, if the Department makes such a finding, it will require that the remedial action be modified to be protective of public health and the environment.

(3) The SEQRA exemption set forth in this subdivision is in addition to, and not in place of, other exemptions to SEQRA that apply set forth in Parts 617 or 618 (e.g. the enforcement exemption).